CONFRONTING TERROR: COMPARATIVE ANTI-TERRORISM LAW

Professor Kent Roach

and

Mr. Stanley Cohen

2004

Faculty of Law
University of Toronto

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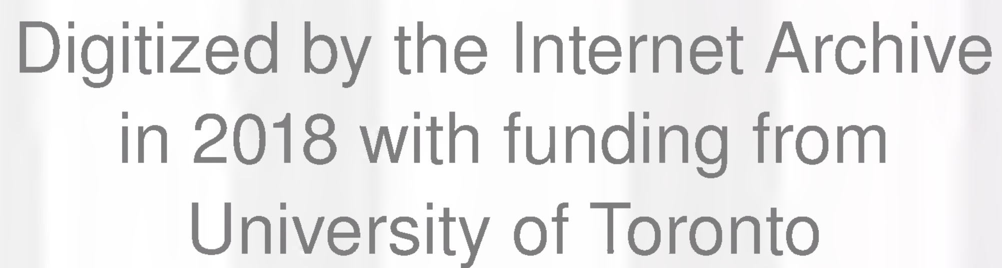
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Confronting Terror: Comparative Anti-Terrorism Law

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The World Wide Expansion of Anti-Terrorism Laws After 11 September 2001

Kent Roach*
Revised May 14, 2003

The terrorist attacks on the United States of 11 September 2001 and a subsequent United Nations Security Council Resolution calling for laws that would treat terrorist acts and the financing of terrorism as "serious criminal offences in domestic law"[1] have resulted in a wave of new anti-terrorism laws in all corners of the world. Even Italy a country that had experienced much serious terrorist violence in the 1970's and 1980's, as well as much success in its eventual eradication, amended its Penal Code on 15 December, 2001 to provide new crimes of terrorism. The timing of new legislation in Italy was significant because it fell just before the ninety day deadline when countries were required to report back to the Security Council on steps taken to implement the U.N. anti-terrorism resolution. The United Kingdom, the United States and Canada all enacted new anti-terrorism laws within this tight frame. These countries were soon joined by others including Australia, Hong Kong, Indonesia, India, and New Zealand.

There has been a migration of ideas about anti-terrorism law across domestic systems and through the international system. Much of this work has been done by policy-makers who have been required to work quickly to ensure that their country's laws comply with various international standards. The academics now have an important duty to reflect on the implications of this flurry of new anti-terrorism laws. The comparative study of anti-terrorism laws should thrive as a discipline. It will, however, be a demanding discipline with both a descriptive and a normative function. Scholars will have to appreciate the interactions between international and domestic law and also have an understanding of the basic principles of substantive criminal law, criminal procedure, sentencing, immigration, regulatory and constitutional law that have in many cases been altered by new anti-terrorism regimes. Scholars should also evaluate the effects of anti-terrorism laws on fundamental freedoms, fairness, liberty, privacy and equality to ensure that efforts to protect democracies from terrorism do not in themselves threaten democracy.

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* Professor of Law, University of Toronto. This is a revised version of a lecture given at the University of Siena on 29 April. 2003. I sincerely thank Professor Roberto Guerrini and the Facolta di Giurisprudenza at the Universita di Siena for inviting me to give this lecture.

[1] United Nations Security Council Resolution 1373 28 September, 2001.

The dominant theme that emerges from my very preliminary survey of comparative anti-terrorism law, with an admitted focus on Anglo-American jurisdictions, is that anti-terrorism law has expanded in a number of senses. First, the definition of terrorism has become broader. In many countries terrorism is defined in such a broad fashion that it is no longer confined, as it is in Italy, to violence with the purpose of inflicting terror or subverting democratic order, but includes politically motivated destruction of property and disruptions of electronic systems and essential services. In some countries, the victims of broad new crimes of terrorism may be public and private corporations that provide essential services, as well as the state. In the first part of this paper, I will examine various definitions of terrorism in domestic and international anti-terrorism law with a focus on the expanded definition of terrorism.

The expansion of anti-terrorism law has not been limited to broader definitions of terrorism. In the second part of this paper, I will examine how new offences of terrorism have been defined broadly to include many acts of preparation for terrorism that might not otherwise constitute attempted crimes. The most prominent examples are various offences which prohibit the financing or collection of funds or properties for terrorism. Some countries have also made training terrorists or possession of instruments or information that can be used for terrorism to be crimes. Concerns about preventing terrorism have expanded the boundaries of inchoate liability and resulted in new offences that apply long before an actual act of terrorism has been committed. These new offences have some constitutional significance as the legislature has replaced the judiciary in deciding when an act of preparation to commit terrorism is sufficient to result in criminal liability. As will be seen, the legislature has criminalized acts that are quite remote from any completed act of terrorism.

The third part of this paper will examine how new offences of terrorism have expanded the traditional limits of accomplice liability to make various forms of association with terrorists and even membership or participation in a terrorist group itself a crime. This expansion of anti-terrorist law also has constitutional significance because of the ability of the executive branch of government to designate and prohibit groups as illegal terrorist groups, as opposed to allowing the courts themselves to determine whether a particular group is a terrorist group. Once a group is declared to be an illegal terrorist group, then a

broad array of financing and associational offences will apply to those who may give it money or property or participate in its activities. The United States has not made membership or participation in a terrorist group illegal in its domestic criminal law in part because of concerns about freedom of association. The criminalization of membership in a terrorist organization in other countries, however, raises interesting comparisons between the American Bill of Rights and modern post-World War II bills of rights such as the European Convention on Human Rights and the Canadian Charter of Rights and Freedoms.

In the fourth part of this paper, I will briefly examine how new anti-terrorism laws have also expanded police powers in a number of jurisdictions, most notably with respect to powers of electronic surveillance and preventive detention. With brief reference to Italy's innovative use of reductions of punishment as a means to encourage those in terrorist groups to co-operate with terrorism investigations, as well as attempts to protect against the horrors of nuclear or biological terrorism, I will also examine alternative anti-terrorism strategies that may be more successful than expanding the crimes of terrorism and increasing the severity of their punishment or increasing the powers of the police.

I. **Expanding Definitions of Terrorism**

The most influential template for post-September 11 anti-terrorism laws was the United Kingdom's *Terrorism Act, 2000*.[2] This law was enacted with all party approval before September 11 as a means to consolidate and expand on various anti-terrorism laws that were enacted, initially as emergency measures, to deal with the terrorist violence of the Irish Republican Army. The still new United Kingdom law became something of a gold standard after September 11, particularly in Commonwealth countries. In a sort of "bricolage"[3], this new law was what was at hand when policy-makers in many other countries turned to the task of drafting new anti-terrorism laws in the aftermath of September 11. It is thus necessary to understand in some detail this very influential anti-terrorism law.

Section 1 (1) of the U.K. act defines terrorism as actions or threats "made for the purpose of advancing a political, religious or ideological cause". This requirement goes

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[2] Chapter 11.

[3] On the applicability of this term, borrowed from the work of Claude Levi-Strauss, to comparative constitutional law see M. Tushnet "The Possibilities of Comparative Constitutional Law" (1999) 108 Yale L.J.

against the traditional criminal law principle that the accused's motive is not an essential element of an offence. It means that police and prosecutors will be derelict in their duties if they do not collect evidence about a terrorist suspect's religion or politics. In my view, this presents a threat to liberal principles that democracies do not generally inquire into why a person committed a crime, but only whether he or she acted intentionally or without some other form of culpability. It also may have a chilling effect on those whose political or religious views are outside of the mainstream and perhaps similar to those held by terrorists. Investigations into political and religious motives can inhibit dissent in a democracy. In response to such concerns, Canada added a clause to its definition of terrorism stating that "the expression of a political, religious or ideological thought, belief or opinion" will not by itself constitute a terrorist activity.[4]

In addition to the requirement of proof of political or religious motive, the prosecutor under the U.K. statute must establish that the action or threat was "designed to influence the government or to intimidate the public or a section of the public". This requirement is found in many international conventions relating to terrorism and helps distinguish terrorism from ordinary crime. Such distinctions are important because a terrorist as opposed to an ordinary criminal is often subject to increased police powers and increased punishment. The requirement that terrorist crimes be designed to influence a government or intimidate the public is much less controversial than the political or religious motive requirement.

"Government" in the United Kingdom act is defined to include foreign governments and the public is defined to include the public of a country other than the United Kingdom. Most new anti-terrorism acts apply so that a person can be prosecuted domestically for supporting actions abroad which satisfy the definition of terrorism. On the one hand, this acknowledges that some of the most dangerous forms of modern terrorism are international or transnational forms of terrorism in which terrorists use one country as a base to plan terrorism in another country. Some of the September 11 terrorists used Germany as a base for their actions and before September 11, one al Qaeda terrorist with plans to bomb the Los Angeles airport was apprehended when he tried to enter the United States from Canada. At

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1225; D. Schneiderman "Exchanging Constitutions: Constitutional Bricolage in Canada" (2002) 40 Osgoode Hall L.J. 401.

the same time, the extraterritorial ambit of many modern anti-terrorism laws means that people in one country could possibly be prosecuted for supporting and financing freedom or resistance movements in their former homelands. Nelson Mandela whose African National Congress was seen by many as a terrorist organization has for one expressed scepticism about the ability to define terrorism in a manner that excludes those who are freedom fighters.

Under the United Kingdom's *Terrorism Act, 2000*, politically or religious motivated actions designed to influence any government or intimidate any public must cause certain prohibited acts to be considered acts of terrorism. These prohibited acts are:

1) serious violence against a person
2) serious damage to property
3) endangering a person's life, other than the person committing the action
4) the creation of a serious risk to public health or safety
5) serious interference or disruption of an electronic system[5]

These prohibited acts are broadly defined in an attempt to include modern forms of terrorism such as the use of biological or chemical poisons or disruptions of computer systems. The broad definition of terrorism in the U.K.'s *Terrorism Act, 2000* stands in sharp contrast to the definition of terrorism in s.20 of the previous *Prevention of Terrorism (Temporary Measures) Act, 1989* which was limited to "the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear."[6]

The broad new British definition of terrorism is rightly controversial. Although he recognizes that the new British definition "is broader than most equivalents in international law", Professor Clive Walker of Leeds is generally sympathetic and concludes that the new law "forms a permanent monument to the fragmented risk of terrorism in the late modern, globalized world." [7] Professor Andrew Ashworth of Oxford expresses greater concern. He has argued that the new British definition of terrorism "introduces a much wider concept of terrorism than existed previously and one that might well embrace forms of so-called

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[4] Canadian Criminal Code s.83.01(1.1) as amended by The Anti-Terrorism Act S.C. 2001 c.41.
[5] *Terrorism act, 2000* U.K. ch. 11 s.1(2).
[6] Ch. 4 s. 20.

organized crime." He adds that the "emotive sway" of labels such as terrorism "makes it particularly important to take a critical view of the definitions employed, and to be on guard against the covert expansion" of crimes and of "normalizing the exceptional".[8]

In my view, there are real questions whether it is necessary to define all politically motivated serious damage to property or serious disruptions of electronic systems as terrorism. Some in the anti-globalization, environmental and animal rights movements fear that they could be labeled as terrorists under such broad laws even if they have committed no acts of violence against any person and have not attempted to overthrow a government by the use of force. We must also be sensitive to the fact that new anti-terrorism laws do much more than make specific politically motivated acts crimes. When a person is labeled as a terrorist under these acts, all those who associate with that person, provide that person with property and funds and participate in organizations with that person are also liable to be both labeled and prosecuted as terrorists. Moreover, they can be guilty even if the acts of terrorism will occur abroad in the course of resistance to non-democratic regimes.

Despite these problems, the broad British definition of terrorism has been very influential, particularly in former British colonies. The Canadian definition of terrorism follows the British requirement of political or religious motive and intimidating the public, but adds that the intimidation can be done with regard to public security including "economic security." [9] Security is an extremely vague term that applies to all sorts of well-being and perceptions of well-being. The idea of economic security is even broader and vaguer. The Canadian definition of terrorism also includes politically motivated acts designed to compel any person, government or domestic or international organization to do or refrain from doing any act. This means that actions designed to compel corporations and which threaten economic security could be defined as terrorism in Canada. The Canadian law, however, takes a more restrictive approach with respect to property damage and requires that such damage be so extensive that it will cause death or bodily harm, danger to

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[7] C. Walker *Blackstone's Guide to the Anti-Terrorism Legislation* (Oxford: Oxford University Press, 2002) at 29, 37.
[8] A. Ashworth *Human Rights, Serious Crime and Criminal Procedure* (London: Sweet and Maxwell, 2002) at 95, 107.
[9] I examine the Canadian definition of terrorism in greater detail in K. Roach "Canada's New Anti-Terrorism Law" [2002] Singapore J.of Legal Studies 122-148.

life or a serious risk to public health or safety.[10] Thus the politically motivated destruction of property that presents no danger to human life and safety would not satisfy the legal definition of terrorism in Canada.

In other respects, however, the Canadian definition of terrorism is broader than the British. Terrorism in Canada includes serious disruptions of "an essential service, facility or system, whether public or private". Australia in its new anti-terrorism law has achieved much the same result by defining an electronic system to include:

1) an information system
2) a telecommunication system
3) a financial system
4) a system used for the delivery of essential governmental services
5) a system used for, or by, an essential public utility
6) a system used for, or by, a transport system[11]

The result is that both Canadian and Australian law now define as terrorism politically or religiously motivated disruptions of a staggeringly broad array of essential public services. Taken by itself, such a definition of terrorism would cover many strikes and acts of political protest.

Fortunately both the Canadian and Australian laws contain exemptions for advocacy, protest, dissent or stoppage of work so long as they are not intended to cause death, serious bodily harm, danger to life or a serious risk to public health or safety.[12] The British definition, however, does not have such an exemption even though it would seem appropriate in a democracy dedicated to allowing all forms of peaceable dissent. As originally proposed the Canadian exemption would have only applied to legal protests or strikes. This raised legitimate concerns that some strikes and protests could be considered acts of terrorism because they broke some law, including laws regulating the use of strikes and property.[13] The Canadian government responded to these criticisms by removing the requirement that exempted strikes and protest must be legal. Some still fear, however, that a

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[10] *Criminal Code of Canada* s. 83.01(b) (ii)(D).
[11] Security Legislation Amendment (Terrorism) Act 2002 No. 65, 2002 s. 100.1(2)
[12] ibid s.100.1(2A); *Criminal Code of Canada* s.83.01(b)
[13] For a book largely full of criticisms of the Canadian anti-terrorism bill as originally introduced see R. Daniels, P. Macklem and K. Roach *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*

politically motivated strike that intentionally results in a serious risk to public health or safety could still satisfy the Canadian definition of terrorism. [14] The issue is not whether such strikes and laws should be prohibited by some law, but whether they should be subject to the extraordinary legal regime that targets terrorism.

The new Canadian anti-terrorism law is also designed to increase the severity of punishment for terrorism. There are provisions deeming the commission of a terrorist offence an aggravating factor at sentencing, as well as other provisions requiring longer periods of parole ineligibility. There are also provisions that allow an enhanced sentence of life imprisonment for the commission of a terrorist offence. The death penalty is not available under Canadian law and would be held to be a violation of the Canadian Charter of Rights and Freedoms. Judges are required by the new anti-terrorism to ensure that offenders serve multiple sentences for terrorism in a consecutive as opposed to a concurrent manner. The increased punishment for terrorism seems based on the dubious proposition that potential terrorists will be deterred by the increased severity of punishment.

Another important feature of the Canadian definition of terrorism is that it applies not only to completed crimes but also to "a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission".[15] The concepts of conspiracy, attempt, counselling and accessory after the fact are relatively well defined in the Canadian Criminal Code.[16] The main problem in the terrorism context, however, is that they will extend offences that already criminalize acts of preparation for terrorism. People may be prosecuted for offences such as an attempt or conspiracy to instruct or facilitate terrorism with the prohibited act being very remote from any complete offence of terrorism. The result may be complex charges which extend the criminal law in an unforeseen and unprecedented manner.

Even more troubling is that the idea that any threat to commit an act or omission which constitutes a terrorist act will itself constitute a crime of terrorism. Threats to murder

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(Toronto: University of Toronto Press, 2001). For some recent defences of Canada's anti-terrorism see most of the essays in a special issue of (2002) 14 National J. of Constitutional Law 1-168.

[14] A similar law enacted in Hong Kong addresses some of these concerns by applying the exemption for advocacy, protest, dissent or industrial action not only to the disruption of essential services but also to the creation of serious risks to public health and safety. *United Nations (Anti-Terrorism Measures) Ordinance* Cap. 575.

[15] *Criminal Code of Canada* s. 83.01(b)

[16] For discussion see K. Roach *Criminal Law* 2nd ed (Toronto: Irwin Law, 2000) ch. 3.

or maim are serious matters already subject to criminal sanction, but a threat to disrupt an essential service may be part of vigourous democratic debate. Because threats are designated as a terrorist act, they are not likely protected by the provision that exempts the expression of political, religious or ideological thought, belief or opinion[17] from the Canadian definition of terrorism.

An unique feature of the Canadian definition of terrorism is an alternative definition of terrorism as acts or omissions committed inside or outside of Canada that if committed in Canada would constitute crimes in Canada, but only to the extent necessary to implement ten international conventions relating to terrorism that have been signed by Canada. The targeted acts of terrorism include the unlawful seizure of aircraft, crimes against internationally protected persons, the taking of hostages, crimes in relation to nuclear materials, terrorist bombings and the financing of terrorism. This definition of terrorism, which contains ten subparagraphs, is incredibly complex.[18] The Supreme Court of Canada has already split over whether a similarly worded war crime offence simply provided elements that the state must prove to give Canada jurisdiction over acts committed outside of Canada or whether they also defined fault elements for the offence.[19] This part of the definition of terrorism seems designed to demonstrate Canada's willingness to implement the various international conventions against terrorism that it has signed. It is a most visible sign of how the norms of international law now penetrate domestic law.

The increasing role of international law in shaping the domestic criminal law is not without controversy. It could be argued that by effectively incorporating international conventions into the Canadian Criminal Code, the above section offends principles of legality and codification. It will be difficult to determine the extent to which any particular crime implements an international convention and the particular international convention will not be as readily accessible to the public as the Criminal Code. Nevertheless, the Supreme Court of Canada has held that a common law crime of contempt of court does not violate the principles of fundamental justice as protected under the Canadian constitution.[20] In addition, the Court itself is increasingly interpreting domestic Canadian law in

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[17] *Criminal Code of Canada* s.83.01(1.1).
[18] *Criminal Code of Canada* s.83.01(1)(a).
[19] *R. v. Finta* [1994] 1 S.C.R. 701.
[20] *United Nurses of Alberta v. Alberta (A.G.)* [1992] 1 S.C.R. 901.

accordance with international law.[21] Another danger is the idea, implicit in many international anti-terrorism conventions and resolutions, that tough criminal sanctions against terrorism are required to protect human rights[22] may overestimate the efficacy of the criminal sanction in achieving security and discount its coercive aspects. [23]

In any event, it is clear that Canada's new definition of terrorism is very broad and is in some respects even broader that the British definition on which it is based. The breadth of Canada's new definition of terrorism is well illustrated by the fact that the Supreme Court of Canada has interpreted an undefined reference to terrorism in Canada's Immigration Act in a much more restricted manner than the Canadian legislature defined terrorism in the Criminal Code after September 11. The Canadian Court used a definition of terrorism taken from the 1999 International Convention on the Suppression of the Financing of Terrorism that defined terrorism as "any act intended to cause death or serious bodily injury to a civilian" where the act is designed "to intimidate a population or to compel a government or an international organization to do or abstain from doing any act". Despite noting that this definition "catches the essence of what the world understands by "terrorism"", the Canadian Supreme Court hastened to add that the Canadian legislature was free to adopt a different definition.[24] The legislature has, of course, adopted a much broader definition of terrorism, but there are no cases yet in Canada interpreting the limits of this new definition of terrorism.

Perhaps surprisingly given that its new anti-terrorism law was rushed through the Congress with little opposition shortly after the terrible terrorist attacks of 11 September 2001, the United States defines terrorism in a more restricted and more precise manner than either the United Kingdom or Canada. The United Kingdom's *Terrorism Act, 2000* appears to have had little influence on the drafting of post-September 11 anti-terrorism laws in the United States, certainly as compared to other countries such as Canada, Australia, New Zealand and Hong Kong. Both international and domestic terrorism are defined under the *Patriot Act* as "violent acts or acts dangerous to a human life" that would violate American

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[21] *Suresh v. Canada* (2002) 208 D.L.R.(4th) 1; [2002] S.C.C 1
[22] See for example I. Cotler "Towards a Counter-Terrorism Law and Policy" (1998) 10 Terrorism and Political Violence 1.
[23] I elaborate on this argument in K. Roach "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism" (2002) 47 McGill L.J. 893 at
[24] *Suresh v. Canada* (2002) 208 D.L.R.(4th) 1; [2002] S.C.C 1 at para 94

laws and which "appear to be intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion or to affect the conduct of a government by mass destruction, assassination or kidnapping."[25] This definition does not require proof of political or religious motive and it does not in itself include destruction of property or disruptions of electronic systems or essential services.

A broader federal offence applies to acts of terrorism transcending the national borders of the United States. Most criminal law in the United States is enacted at the state level and this crime of international terrorism only applies if there is some effect on interstate or foreign commerce or the victim is the United States government or its employees. The crime applies to anyone who "kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon" or to anyone who threatens, attempts or conspires to commit such an offence. It also applies to anyone who "creates a substantial risk of serious bodily injury to any person by destroying or damaging" property or "by attempting or conspiring to destroy or damage" any such property in the United States. The penalties for this federal crime of international terrorism are severe. They include the death penalty or imprisonment for any term of years if death results; imprisonment up to 35 years for maiming and imprisonment for up to 25 years for property damage. [26] This offence and another federal offence of attacks against mass transportation systems[27] may in the end cover some of the same ground as the broader property and essential services offences found in the British and Canadian legislation. In addition, there are many separate federal offences in the United States relating to knowingly misusing a passport, identification or visa papers to commit a crime of international terrorism, which are subject to long imprisonment terms of 25 or 20 years.[28]

II. Expanding Crimes of Preparation for Terrorism

The expanded definition of terrorism in the new anti-terrorism laws of many countries has been accompanied by expanded crimes that are designed to punish a wide array of acts in preparation for terrorism. The December 15, 2001 amendments to Italy's Penal Code fall into this category as they apply to those who promote, set up, organize,

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[25] Patriot Act s. 801 amending 18 USC s.2331 (international terrorism) and 18 USC s.2331 (domestic terrorism)
[26] 18 U.S.C. s.2332b
[27] ibid
[28] 18 USC ss.1544, 1546, 1028,

direct or finance any common association that intends to commit terrorism. In addition, the offence applies to whoever shelters or nourishes, hosts or provides transport or communication to terrorists.

The Canadian law features several offences relating to the financing of terrorism. One particularly broad offence makes it a crime punishable by up to ten years imprisonment to provide or invite a person to provide property, financial or other services intending or knowing that they will be used by or will benefit a terrorist group.[29] A terrorist group is defined broadly as any entity listed by the government as a terrorist group or any entity, including an association of groups, that has as one of it purposes or activities, the facilitation or carrying out of a terrorist activity.[30] This offence requires no nexus to any actual terrorist activity [31]and could in theory be applied to anyone including doctors, lawyers or bankers who provide services to a terrorist group. The intent seems to be to make terrorist groups outlaws or legal untouchables. Although this may be an effective and justifiable in stopping a hard core group committed to violent terrorism either at home or abroad, it may be disproportionate and overbroad when applied to a group that is supporting resistance activities in a foreign land and that may also support legitimate charities and political dissent.

The Canadian law also makes it an offence to knowingly facilitate a terrorist activity whether or not the facilitator knows any particular terrorist activity was planned and to give instructions either to commit terrorist activities or for actions that will facilitate the commission of terrorist activities.[32] The intent of such laws is to expand the traditional law governing attempted crimes and to punish many acts of preparation for actual terrorism. This should give the police resources to intervene long before the actual violence or destruction occurs. At the same time, however, such laws seem based on the dubious proposition that existing laws relating to attempts, conspiracy or counseling crimes were inadequate to respond to terrorism. In Canada, courts have accepted that people may be guilty of an attempted crime even though a considerable period of time may pass before the

[29] Criminal Code of Canada s.83.03.
[30] ibid s.83.01
[31] In contrast, an offence of providing property in s.83.02 does require some nexus to a terrorist activity.
[32] Criminal Code of Canada ss. 83.19, 83.21, 83.22.

crime can be completed.[33] Courts in the United Kingdom have also held that people can be guilty of conspiracy even though they do not know all the details of the crime being planned.[34] The failure of September 11 seems to have been more one of law enforcement than of the criminal law as it relates to inchoate crimes. In Canada, at least,[35] the September 11 terrorists would have been guilty of crimes such as attempted murder and conspiracy to hijack a plane and murder people long before they boarded the doomed aircraft.

The United Kingdom's *Anti-terrorism act, 2000* makes criminal a variety of forms of preparation for acts of terrorism. Section 15 makes it an offence to invite, receive or provide money or property with either the subjective intention or with "reasonable cause to suspect" that the money or property will be used for the purposes of terrorism. Although this offence requires some nexus to a terrorist act, it is stricter than comparable Canadian offences because it contemplates the conviction of a person who did not know that the money would be used for terrorism but who had "reasonable cause to suspect" that it would be. This seems to be even stricter that the standard negligence requirement that the person ought to have known the prohibited circumstances and consequences. At the very least, it constitutes a significant departure from subjective fault principles.

The United Kingdom law also makes it an offence to possess money or property intending or having a reasonable cause to suspect that it may be used for the purposes of terrorism.[36] It is also an offence to provide, receive or even issue an invitation with respect to weapons training for terrorism[37] or to possess an article for terrorist purposes[38] or to collect information or possess documents or records for terrorist purposes.[39] Not only are these offences very broadly worded and apply to remote acts of preparation for terrorism,

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[33] *R. v. Deutsch* [1986] 2 S.C.R. 2

[34] *DPP v. Maxwell* [1978] 3 All E.R. 1140.

[35] In some countries, however, inchoate offences may be inadequate to deal with terrorism. The Indonesian Penal Code, based on a Dutch model, defines an attempted crimes very narrowly to require the "commencement of the performance and the performance is not completed only because of circumstances independent of the will." Indonesian law also does not provide general crimes of conspiracy or counselling a crime that is not completed. After the terrorist bombings in Bali in 2002 which resulted in over 200 deaths, Indonesia passed a special law that prohibits threats of violence, conspiracy, attempts or assistance in terrorism, providing or collecting funds for terrorism, the possession of arms, explosives, and hazardous substances with the intent to commit a criminal act of terrorism as well as harbouring terrorists or hiding information about criminal acts of terrorism. See Government Regulation in Lieu of Law No.1 Year 2002.

[36] *Terrorism Act, 2000* s.16(2).

[37] Ibid s.54.

[38] ibid s.57.

[39] ibid s.58.

but the accused generally has an evidential burden to point to evidence to displace a presumption that the training, article or information was not for a terrorist purpose.[40] In a modern echo of the old offence of misprison of treason, the British law now has several offences for failure to provide authorities with information relating to terrorist offences. [41]

The new Australian legislation also provides a robust example of the broad array of offences that now apply to various forms of preparation for acts of terrorism. It is a serious offence either to provide or receive training connected with terrorist acts. A person who knows that the training will be used for terrorism can be imprisoned for up to 25 years while the person who is reckless in this regard can be imprisoned for up to 15 years.[42] The Australian legislation is superior to the British legislation in distinguishing different levels of culpability.

There are also offences in Australia of possessing things are "connected with preparation for, the engagement of a person in, or assistance in a terrorist act"[43] and making documents to prepare or assist in terrorism.[44] There are separate offences relating to recruiting for a terrorist organization[45], training or receiving training from a terrorist organization[46], getting funds to or from a terrorist organization[47], providing support to a terrorist organization[48] and financing terrorism.[49] Finally, there is a catch-all offence that "any act in preparation for, or planning a terrorist act."[50] The traditional law of attempted crimes has been both expanded and particularized. This will give the state legal resources to prosecute those who have done even minor acts of preparation for terrorism or assistance of terrorists even though any actual terrorist act may be quite remote. At the same time, however, such legislative detailing of various acts of preparation as separate crimes takes away the freedom of the independent judiciary to determine in a case by case manner

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[40] ibid s. 118. The reduction of persuasive burdens on the accused to evidential burdens reflects the impact of *R. v. DPP ex parte Kebilene* [1999] 3 WLR 972.
[41] ibid s.19; *Anti-terrorism, Crime and Security Act, 2001* c.24 s. 117
[42] Security Legislation Amendment (Terrorism) Act 2002 No. 65, 2002 s.101.2
[43] ibid s.101.4
[44] ibid s.101.5
[45] ibid s. 102.4
[46] ibid s.102.5
[47] ibid s.102.6
[48] ibid s.102.7
[49] ibid s.103.1
[50] ibid s.101.6

whether specific acts are sufficiently proximate to completed crimes of terrorism to themselves by worthy of criminal punishment.

American anti-terrorism law also criminalizes acts of preparation for terrorism. The American *Antiterrorism and Effective Death Penalty Act of 1996*, enacted after the Oklahama City bombings, made it an offence to "knowingly provide material support or resources to a foreign terrorist organization, or attempts or conspires to do so"[51] and provided a procedure for the designation of such organizations. The 2001 American *Patriot Act* provided enhanced provisions concerning the prohibition of international money laundering and the financing of terrorism. There is a web of complex laws in many countries applying to the financing of terrorism and banks and other service providers have to take steps to ensure that they are not guilty of these new crimes which can be committed both inside and outside of the domestic jurisdiction.

New anti-terrorism laws have not only expanded the forms of liability before an act of terrorism has been committed, but also after an act of terrorism has been committed. The American *Patriot Act* [52]created a broad and new offence of harboring or concealing terrorists that is punishable by up to ten years imprisonment. It applies to "whoever harbors or conceal any person who he knows, or has reasonable grounds to believe, has committed" a series of listed offences including those relating to biological, chemical or nuclear weapons or other weapons of mass destruction, and various offences relating to aircraft and ships. A person can be guilty of this serious offence even if they do not know that the person they are assisting is guilty of one of these crimes, but rather if they ought to know.

The comparable Canadian offence takes a more restrictive approach and applies to "every one who knowingly harbours or conceals any person who he or she knows to be a person who has carried out or is likely to carry out a terrorist activity, for the purpose of enabling the person to facilitate or carry out any terrorist activity."[53] The Canadian approach of requiring proof of the accused's subjective intent and knowledge may perhaps be explained by the fact that the Supreme Court of Canada has held that murder, attempted murder and war crimes have such a high stigma and penalty that it would be unfair to punish a person for those crimes in the absence of proof of subjective fault for all elements of the

[51] 18 USC s.2339B of c.113B
[52] Patriot Act s. 803 amending 18 USC s.2339

prohibited act. There is a possibility that terrorism in Canada will be held to be a similar offence.[54] In my view, the Canadian approach is preferable to both American and British use of negligence liability because the stigma and penalties for any offence with the label terrorism will be disproportionately high if the accused only acts in a negligent manner. A terrorist is an intentional criminal, not a negligent one.

III. Expanding Crimes of Participation in Terrorism and Membership in Terrorist Organizations

New anti-terrorism laws expand accomplice liability to catch not only those who assist in acts of terrorism and preparation for acts of terrorism, but those who associate, participate or are members of a terrorist group. Section 11 of the United Kingdom's *Terrorism Act, 2000* makes it an offence to be a member of a terrorist organization or to profess to belong to a proscribed organization even though one may have not assisted any act of terrorism. It is a defence if the person can establish that the organization was not proscribed by the Secretary of State when he or she joined or that the person has not taken part in the activities of the organization at any time while it was proscribed. There is a procedure for appeal of a proscription decision to a commission with the Orwellian title of the Proscribed Organization Appeal Commission and to the courts. The organizations which are proscribed under the law include not only the Irish Republican Army and the Ulster Freedom Fighters, but also foreign groups such as al Qaeda, Egyptian Islamic Jihad, the Liberation Tigers of Tamil, the Kurdistan Workers Party (PKK) and Basque Homeland and Liberty (ETA).[55]

There is also a broad range of offences that attach to involvement with illegal or proscribed terrorist organizations. These include inviting financial or other support for a proscribed organization, arranging a meeting to support the organization or a meeting that will be addressed by a member of the proscribed organization.[56] It is also on offence to wear clothing that arouses "reasonable suspicion that he is a member or supporter of a proscribed organization."[57]

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[53] Criminal Code of Canada s.83.23
[54] *R. v. Martineau* [1990] 2 S.C.R. 633; *R. v. Finta* [1994] 1 S.C.R. 701.
[55] See C. Walker *Blackstone's Guide to the Anti-Terrorism Legislation* supra ch.3.
[56] Terrorism Act, 2000 s.12
[57] ibid s.13.

Making membership in an organization a crime moves in the direction of punishing a person for their status and their beliefs as opposed to their actions. In some non-democratic countries people can be detained on the basis that they are deemed by the executive to constitute a security threat.[58] Offences of membership in a proscribed organization do not go that far, but they move in that direction. An offence that makes membership in any group a serious criminal offence subject to imprisonment for 10 years, as the British offence does, would seem to be a prima facie violation of freedom of association under Article 11 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. Offences that make it illegal to profess to be a member of a proscribed organization, arrange a meeting of the organization or wear clothing associated would a proscribed organization also seem to violate freedom of expression under Article 10.

The crucial question is whether such offences can be justified on the basis that they are prescribed by law and are necessary in a democratic society in the interests of national security or public safety or for the prevention of disorder or crime. There are some grounds to believe that the European Court of Human Rights may be willing to accept such offences as a necessary limit. In 1992, the European Commission of Human Rights rejected a challenge to Article 270 of Italy's Penal Code prohibiting participation or organizing subversive associations that would use violence.[59] It could, however, be argued that the definition of terrorist groups in the United Kingdom law is broader and extends beyond those who would use violence to overthrow political or legal institutions. More recently the Grand Chamber of the European Court of Human Rights has uphold the prohibition of an Islamic political party in part on the basis "that sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention" and that " a political party whose leaders incite violence or puts forth a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognized in the democracy cannot lay claim to the Convention's protections against penalties imposed on those grounds."[60] The case involved the dissolution of a popular political party and bans of its activities under a law on the regulation of political parties and not a repealed criminal offence against religious political parties.

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[58] T. Lee "Malaysia and the Internal Security Act" [2002] Sing. J. of Legal Studies 56.
[59] *Piperno v. Italy* No. 15510/89, decided by Commission 2 December 1992.

An interesting gloss will be whether terrorist crimes tied to membership in an organization or inviting support for a proscribed organization[61] crimes can also be challenged under Article 14 of the *European Convention* which provides that rights such as freedom of expression and association "shall be secured without discrimination" on the grounds of "religion, political or other opinion, national or social origin". There is fear in some communities that official lists of terrorist groups may be developed in a manner that unfairly targets certain religions and people from certain groups.

In both Canada and the United States, governments have not made membership in a terrorist organization a criminal offence. This may in some measure be related to the fact that freedom of association are constitutionally protected in both countries. But as has been seen, the *European Convention* has so far not prevented the United Kingdom from criminalizing membership in proscribed organization. It has not been necessary for the United Kingdom to enter into a formal derogation under Article 15 of the Convention with respect to such offences, as was the case with respect to some powers of preventive detention.[62]

Canada has moved much closer than the United States in the direction of making membership in a terrorist organization a crime. Canada has made it a crime to knowingly participate in or contribute to any activity of a terrorist group for the purpose of enhancing the ability of the group to commit any terrorist crime.[63] The potential breadth of this new offence is underlined by provisions which make it clear that evidence that a person "frequently associates with any of the persons who constitute the terrorist group" or "uses a name, word, symbol or other representation" associated with the terrorist group can be used when a person is charged with the offence.[64] In some respects the Canadian offence of participation in the activity of a terrorist organization may be even broader than the British offence of membership because a person could be guilty of participating in a terrorist organization even if he or she is not a member and does not profess to be a member of a terrorist organization.

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[60] *Refah Partisi (The Welfare Party) and others v. Turkey* at paras 123, 98 13 February 2003.
[61] *Terrorism Act, 2000* c.11 s.12.
[62] *Brogan v. United Kingdom* (1988) 11 E.H.R.R. 117.
[63] Criminal Code of Canada s.83.18
[64] ibid s.83.18(4)(b).

In its defence of this new offence, the Canadian government stressed that it was consistent with the 1982 Canadian Charter of Rights and Freedoms.[65] The Canadian Charter is similar to the European Convention in the sense that it both guarantees various rights and contemplates justified, necessary and reasonable restrictions on those rights. The Canadian Charter is a modern bill of rights which invite governments to prescribe limits on rights and justify them.[66] In the contexts of national security and terrorism, it is likely that courts will give substantial weight to the state's interests in national security and public order in any proportionality analysis. They may be unwilling to second guess the legislature about the necessity or effectiveness of broad criminal offences based on participation or even membership of a proscribed offence. The Canadian courts are likely to find any restriction on freedom of expression or freedom of association inherent in the broad offence of participation in a terrorist group to be a reasonable limit on such rights that is proportionate to the dangers of terrorism. The fact that such an offence is "Charter-proof" in the sense that it will not likely be struck down by the courts, however, does not mean that it is not a potentially dangerous departure from liberal principles of punishing people for overt harmful acts as opposed to their associations, affiliations or status.

The United States has not made membership or participation in a terrorist group a crime. Instead, s.805 of the *Patriot Act* expanded the offence of providing material support for terrorists. Material support is defined broadly as meaning the provision of "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious assets." This offence demonstrated the ability of the Americans to draft crimes in a manner that is both precise but also very broad. One court has suggested that the reference to "training" may be overly broad.[67] A proposed new law, dubbed *Patriot II*, proposes to define training as "instruction or teaching designed

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[65] On the government's defence of the new act see K. Roach *September 11: Consequences for Canada* (Montreal: McGill Queens Press, 2003) ch.3.
[66] On the concept of a modern bill of rights and the dialogue it invites between courts and legislatures about rights and limits on rights see K. Roach *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) ch.4.
[67] *Humanitarian Law Project v. Reno* 205 F 3d 1130 (9th Cir.) cert denied 121 S.Ct. 1226 (2001)

to impart a specific skill.'"[68] With or without such an amendment, the greater precision of the American approach reflects a greater sensitivity to overbreadth and vagueness particularly when freedom of speech and freedom of association may be involved. The Americans have a much longer tradition that the British or the Canadians of challenging vague and overbroad laws under their bills of rights. [69]

The comparison of the Anglo-Canadian position with the American position on criminalizing membership in a terrorist organization raises an interesting issue about the style of rights protection in the United States compared to Europe and Canada. The 18th century American Bill of Rights is at least rhetorically articulated in absolutist terms. The First Amendment provides "Congress shall make no law ...abridging the freedom of speech...or the right of the people peaceably to assemble". It is possible that American courts could decide that membership in a terrorist group does not fall within the right of peaceable assembly, in much the same manner as they find that not all forms of expression constitute protected speech. Nevertheless, it is noteworthy that the United States has not followed either the United Kingdom or Canada in making membership or participation in a terrorist group an offence. One reason may be the more absolutist tradition of commitment to free speech and association under the American Constitution.

In contrast, modern post World War II bills of rights including the European Convention and the Canadian Charter contemplate that reasonable and necessary limits can be prescribed by law on freedom of expression and association. Governments in both the United Kingdom and Canada argue that broad anti-terrorism laws are consistent with their bills of rights. They have enacted these laws as permanent measures and without any emergency derogation of rights. The ultimate judicial response to these broad new crimes of terrorism is not yet known, but there are serious concerns that neither modern bills of rights or the judiciary may provide adequate protection for freedom of association and expression. There will be a temptation for the judiciary to be more willing to accept reasonable limits on rights in a post-September 11 world. The American judiciary will not be immune from this temptation, but traditions of respect for a more or less absolutist understanding of freedom

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[68] *Domestic Security Enhancement Act of 2003* draft 9 January 2003 s.313 see www.dailyrotten.com/sources-docs/patriot2draft. (hereafter "Draft Patriot Act II")

of expression and association has so far prevented the United States from making membership in a terrorist organization or mere association with a terrorist organization a crime. Such restraint is not an inconsiderable achievement given the searing impact of September 11 on the American people.

At the same time, the post-September 11 experience in the United States should not be romanticized. Some terrorist suspects in the United States have been subjected to indefinite detention and not allowed access to lawyers through the device of material witness warrants. Courts have intervened in some of these cases. American prison regulations have been enacted to allow authorities to listen to lawyer client conversations in some cases. Another device to strip terrorist suspects of ordinary due process rights has been to designate them as enemy combatants. President Bush has designated not only those kept at Guantanamo Bay, Cuba as enemy combatants[70], but at least two suspects, Jose Padilla and Yaser Hamdi, who are being indefinitely detained in the United States without the rights normally accorded to the accused. Early in 2003, the Fourth Circuit Court of Appeals upheld the executive designation of Hamdi, in a decision that stressed judicial deference to the executive.[71] The United States immigration system has also targeted people from Arab and Muslim countries for registration including fingerprinting in a more direct and discriminatory manner than in Canada. This is unfortunate because before September 11, both American political parties had agreed to enact legislation to prohibit and monitor racial profiling in which people were subject to investigation because of their race.[72] Canada for a time protested the American registration policy by issuing a travel advisory to Canadians born in the targeted countries that they should not travel to the United States.[73] American courts are split on whether deportation and other immigration procedures can be subject to a

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[69] *Lanzetta v. New Jersey* 306 U.S. 451 (1939); *Kolender v. Lawson* 461 U.S. 352 (1983); *City of Chicago v. Morales* 527 U.S. 41 (1999)

[70] For my arguments that the detention and interrogation of these people violates the Geneva Convention and that Canadian soldiers who delivered captives in Afghanistan to the American forces were complicit in such violations see K. Roach "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism" (2002) 47 McGill L.J. 893 at 935-939.

[71] *Rumsfeld v. Hamdi* no. 02-7338 13 Jan 2003.

[72] S. Gross and D. Livingston "Racial Profiling under Attack" (2002) 102 Colum.L.Rev. 1413. Calls to prohibit racial or religious profiling in Canada's anti-terrorism law or even to add a weaker non-discrimination clause were rejected. Instead the government created a new hate crime to protect religious buildings and made it easier to dilute hate propaganda from the internet. See Roach *September 11: Consequences for Canada* (Montreal: McGill Queens Press, 2003) ch.2

[73] ibid ch.6.

blanket publication ban and the issue will eventually be resolved by the United States Supreme Court.

The threat of anti-terrorism efforts to liberty, democracy and equality in the United States should not be underestimated. The fact remains, however, that the most repressive measures have not occurred through amendment of the formal criminal law and membership in a terrorist organization is still not a crime in the United States. The most repressive measures in the United States have proceeded at the edges of the law and have not been entrenched in the criminal law, as they have been in the United Kingdom and Canada.[74] In some ways, the American approach may be an even more dangerous threat to the rule of law than the extraordinarily broad anti-terrorism laws enacted in the United Kingdom, Canada and other countries, but it does mean that the criminal law relating to terrorism in the United States is more restrained on many issues than the law in other western democracies.

IV. Expanding Police Powers

Another feature of new anti-terrorism acts has been increased police powers. In Canada, these include new powers to make preventive arrests on suspicion that a person would commit a terrorist act and subject to judicial approval to detain that person for a maximum of three days. A person who is subject to preventive arrest may have to enter into a peace bond and agree not to undertake certain proscribed activities. A refusal to agree to such conditions is an offence that can be subject by up to a year in imprisonment and disobeying one of the conditions can result in up to 2 years imprisonment.[75]

Canada's three day preventive arrest period is shorter than British law which allows up to 7 days of preventive detention, with recent proposals for an even longer 14 day period.[76] The new British provision for preventive detention has, unlike previous ones, been enacted without a formal derogation from the *European Convention* on the basis that such an override of rights is not necessary because of the requirement under the British law that the judiciary decide whether detention is required after the first 48 hours. On the one hand,

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[74] But for a disturbing call by Alan Dershowitz that the United States amend its formal law to allow the torture of suspected terrorists in emergency circumstances see A. Dershowitz *Why Terrorism Works* (New Haven: Yale University Press, 2002) ch.4. For an interesting defence of an extra-legal approach (but not necessarily the American approach post-September 11) see O. Gross "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional" (2003) 112 Yale L.J. 1011. One of Gross's point is that an extra-legal approach runs less risk of infecting the formal law with powers designed to deal with emergencies.

[75] Criminal Code of Canada s.83.3

[76] *Terrorism Act, 2000* c.11 s.41 and Schedule 8.

judicial review can be an important safeguard and judges may be expected to order the release of some people held in preventive detention. On the other hand, the idea that preventive detention is consistent with rights protection sits uneasily with liberal values that limit the state's response to crime. The central place of judicial authorization of preventive detention lends some support to those who argue that due process safeguards can enable and legitimate the expansion of the state's crime control activities.

With respect to preventive detention, the American approach is again exceptional. Even though it was quickly passed after September 11 and it is possible that preventive detention combined with better intelligence might have prevented the catastrophic terrorism of that day, the United States *Patriot Act* does not authorize preventive detention. The libertarian norms of the American Bill of Rights still had an influence in light of the national tragedy of September 11. At the same time, however, it would be wrong to conclude that preventive detention has not been used by the United States in its new war against terrorism. As mentioned above, immigration powers, material witness warrants and the designation of terrorist suspects as enemy combatants have been used to subject some people to indefinite detention without the due process safeguards placed on the use of preventive detention either in Canada or the United Kingdom. The detention of over 600 people at Guantanamo Bay may be seen as a lawless form of preventive detention with no apparent limit other than American national interests. This reflects a pattern in the United States of the most repressive measures being at the edges of the law. The Americans are reluctant about authorizing and regulating preventive detention in their criminal law, but willing to employ it outside the formal criminal law. This preserves some of the due process standards of the formal law, but at the same time renders those subject to such extra legal powers without any real opportunity to obtain a judicial remedy.

Both British and Canada criminal law have embraced some inquisitorial powers in their new anti terrorism laws. Schedule 5 of the *Terrorism Act, 2000* contemplates in some instances a judicial order that would require a person to explain material seized or produced under a warrant. Lawyers may be required to provide the names and addresses of their clients, but otherwise legal professional privilege is protected. In Canada, there is provision for a new type of hearing, an investigative hearing, during which a judge can require a person to reveal and produce information about terrorism. Those subject to investigative

hearings are not allowed to object on the grounds of self-incrimination, but their statements and evidence derived from such statements cannot be used in subsequent proceedings against that person. There is also a protection for solicitor client privilege as well as any other law relating to the non-disclosure of information or to privilege and the subject of an investigative hearing can consult counsel at any stage of the proceedings. There was substantial resistance to this new power in Canada when it was introduced shortly after September 11 by those who argued it infringed the right to silence and adversarial traditions.[77] The power has not yet been used in Canada.

The American position is again exceptional. The *Patriot Act* does not provide the same type of formal inquisitorial powers that are found in either the British or Canadian legislation. At the same time, however, a prosecutor in the United States retains the power to compel a person to testify before a grand jury, in the absence of either a judge or defence counsel. If that person invokes their Fifth Amendment right against self-incrimination, the prosecution may have to grant the person immunity from prosecution in order to require them to testify. There have always been inquisitorial elements to American criminal procedure, but they remain largely informal and located at the edges of the law. It will be interesting to see if the formal inquisitorial procedures in the British and Canadian anti-terrorism are used by the police and whether there are demands that they be available in investigations of other serious crimes.

Another feature of post-September 11 anti-terrorism legislation has been a broadening of the ability of the state to use electronic surveillance. In Canada, the police are allowed to obtain judicial warrants authorizing electronic surveillance for a longer period of time and for longer periods without notifying the person whose privacy is being invaded. The United States *Patriot Act* also provided for increased powers of electronic surveillance for terrorism investigations including delayed notice to the targets of the surveillance where immediate notice would have an adverse effect on the investigation. There were also provisions for judicial warrants that would allow roving or multi-point surveillance and the introduction of a nation-wide warrant.[78]

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[77] ibid s.83.28.

[78] See generally M. Wong "Electronic Surveillance and Privacy in the United States After September 11 2001: The USA Patriot Act" [2002] Sing.J. Legal Studies 214-270.

Privacy advocates have raised concerned about increased surveillance of citizens in the wake of September 11. In Canada, there has been extensive criticism of federal plans to keep a database on the foreign travels of its citizens and concern that data about airline passengers will be used for general crime control purposes and not simply to prevent terrorism. In one post-September 11 ruling, however, the Supreme Court of Canada indicated that people do not have a reasonable expectation of privacy that customs declaration signed on their return from foreign travel will not be used by the government for other purposes, in this case the detection of unemployment insurance fraud.[79]

The *Patriot Act* also made it easier for law enforcement officials to share information obtained from electronic surveillance with other law enforcement officers. This was in part a response to concerns that the Federal Bureau of Investigation and the Central Intelligence Agency did not adequately share information about suspected terrorists. In the United Kingdom, the *Anti-terrorism, crime and security act, 2001*[80] that was enacted after September 11 and before the United Kingdom reported back to the Security Council provides various measures to facilitate the sharing of information within government and to allow governmental access to various forms of information held in the private sector. One of the main ways of policing terrorists will be increased information flows within government and between government and the private sector.

Another important feature of American responses to terrorism both after the Oklahoma City bombings and September 11 has been the provision of compensation and services for the victims of terrorism. The Canadian response to September 11 in contrast provided very little for the Canadians who died in those attacks and the United Kingdom act also does not feature victim compensation. The role of victims in the criminal law is complex. There are some concerns that a more emotive focus on victims may make it easier to sacrifice some principles of restraint and may result in overconfidence about the ability of the criminal law to either repair or prevent victimization.[81]

A common feature of many new anti-terrorism acts is the provision of enhanced penalties for acts of terrorism. In the United States, this includes the death penalty which is being sought against a teenager who is being prosecuted under a Virginia anti-terrorism

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[79] *Smith v. Canada* 2001 SCC 81.
[80] C. 24 see Part III and Part XI.

statute for his involvement in random sniper shootings in Washington and its surrounding areas. Even the drafters of the law admit that they never contemplated that it would be used for such crimes. There is a danger that extraordinary new measures in anti-terrorism laws will spread throughout the criminal law.[82] The broad definition of terrorism in many of these laws may facilitate this process of enhancement. There are also real questions whether enhanced punishment, even the ultimate punishment of the death penalty, will deter those prepared to give their lives for some political or religious cause.

American law allows the use of rewards as an alternative to punishment in terrorist investigations. A person can be paid up to $500,000 for assisting a terrorist investigation, but all awards above $100,000 must be authorized by the President or the Attorney General, something that enhances accountability but may well deter the use of large rewards.[83] The person who receives an award must not be a governmental employee.[84] Both those who receive the rewards and their families can be included in the witness protection program.[85] These provisions do not address issues of prosecution or reduction of punishment which would still be dealt with in an ad hoc manner through the exercise of prosecutorial discretion. A draft of the so-called "Patriot II" bill not officially released provides that those who provide information about terrorist activities would be shielded from civil liability.[86]

The American system of rewards is not as sophisticated as the Italian system that was developed in the prosecution of the Red Brigades,[87] but it does represent some recognition that the incentive of the carrot, as well as the punishment of the stick, has a role to play in combating terrorism. In contrast, the Canadian law relies entirely on increased punishment of terrorist acts with no formal incentives for co-operating with terrorist investigations.

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[81] See K. Roach "Four Models of the Criminal Process" (1999) 89 J. of Crim Law and Criminology 489.
[82] In the United Kingdom, the ability to draw adverse inferences from a person's exercise of the right to silence started in emergency legislation that applied to Northern Ireland but subsequently infected the entire criminal law. See O. Gross "Cutting Down Trees: Law-Making Under the Shadow of Great Calamities" in *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001)
[83] 18 USC 3072, 3076
[84] ibid s.3074
[85] ibid
[86] *Draft Patriot Act II* s.313.
[87] For a recent argument that the "United States should explore its own version of a pentiti system that would provide incentives to terrorists, or would-be terrorists, to disassociate from violent activity" to enable "law enforcement to gather important intelligence information and to work to dissolve terrorist organizations from

Another innovative response to terrorism in the United States has been the enactment of the *Public Health Security and Bioterrorism Preparedness Response Act of 2002*.[88] This law provides for increased availability of smallpox vaccines and potassium iodide to limit the harms of acts of biological and nuclear terrorism. It also provides for better monitoring of food, drug and water supplies to protect against intentional as well as accidental forms of contamination. It also strengthens the ability of the Center for Disease Control and health care providers to respond to biological terrorism and it provides for increased control over dangerous biological substances. There is also an emphasis on emergency preparedness. One virtue of such a public health approach is that it can limit the harms caused not only by acts of terrorism, but accidental contamination of water and food supplies and other disasters.[89]

V. Conclusion

There is a need for creative and innovative approaches to combat terrorism. The devastation that could be caused by successful chemical, biological or nuclear terrorism could dwarf the terrible harms of the terrorist attacks of September 11. The recent pneumonia that has spread from China throughout much of the world underlines our global vulnerability to the spread of scourges such as smallpox. In many countries that response to September 11 has been to enact expanded criminal law. As suggested in this paper, these laws are characterized by expanded definitions of terrorism that go well beyond violence designed to intimidate civilians. They also contain expanded crimes of terrorism that make illegal acts of preparation for terrorism that might not be caught by the ordinary criminal law. They also criminalize membership or participation in a prohibited terrorist organization in a way that goes beyond accomplice liability for actual terrorist acts. Finally, both police investigative powers and punishments have been enhanced.

There are serious questions whether an expanded criminal law is the best means to respond to the very real threat of terrorism. Promising alternative strategies include better law enforcement and security intelligence; strategic use of rewards and even grants of

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the inside out" see M. Dunham "Eliminating the Domestic Terrorist Threat in the United States: A Case Study on the Eradication of the Red Brigades" (2002) 107 Dickinson L.Rev. 151 at 178.

[88] Public Law 107-188 107th Congress

[89] Somewhat similar but less comprehensive legislation has been proposed in Canada, but not yet enacted. On the value of anti-terrorism strategies that focus less on the criminal law and more on administrative control of

immunity to penetrate terrorist cells; more emphasis on the administrative regulation of weapons and substances that can be used by terrorists to cause death and destruction and better emergency response to limit the harms of terrorism. These alternatives may present less of a threat to privacy, liberty, equality and the traditional principles of criminal law. In our world-wide expansion of anti-terrorism laws, we may be placing too much reliance on the criminal law and be risking some of the principles of fairness, equality, privacy and freedom that distinguish democrats from terrorists.

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substances and sites vulnerable to terrorism and public health measures see K.Roach *September 11: Consequences for Canada* (Montreal: McGill Queens, 2003) ch.7.

 (next page 529).

Some Eastern and Western Responses to September 11 and the Dilemmas of Militant Democracy

15 October 2003 Draft, not for citation

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The September 11 terrorist attacks on the United States triggered a world-wide expansion of anti-terrorism laws in an attempt to deter and apprehend those who would exploit democratic freedoms in order to undermine and, if possible, destroy democratic societies. New laws target those who prepare to commit acts of terrorism with extremist religious or political motives and allow for preventive detention and guilt based on membership in or association with proscribed groups. There has been notorious flouting of international law, derogation from rights protection instruments and even calls to legalize torture when necessary to prevent the type of mass terrorism seen on September 11. In varying degrees, the balance between the state and the individual in the west has shifted since September 11 as the west has become prepared to take decisive and even draconian action to protect its democracy.

The new prominence of security in the west has implications for its relationship with the east and the potential for democracy in Asia. Western criticisms of the way that countries such as Pakistan, Singapore and Malaysia deal with security issues have been almost inaudible since September 11. Internal security acts that allow preventive detention without trial do not look so bad when they are used to detain committed cells of potential suicide bombers associated with al Qaeda. Western criticisms may also have been muted because of a recognition that the west itself practices preventive detention under criminal and especially immigration laws. Many have characterized September 11 as a set back for attempts to abolish Asian internal security laws and to better protect civil liberties in authoritarian Asian states.[1] Many liberals in Asia fear that "the security-oriented responses of governments in the region may impede and slow the emergence of the free and dynamic

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[1] Hadi Soesastro "Global Terrorism: Implications for State and Human Security" in U. Johannen, A. Smith and J. Gomez *September 11 and Political Freedom: Asian Perspectives* (Singapore: Select Publishing 2003) at 77; Therese Lee "Malaysia and the Internal Security Act: The Insecurity of Human Rights After September 11" [2002] Sing J.L.S. 56.

civil society needed for a healthy democracy."[2] The story here is one of convergence as both the west and the east stress collective security over individual liberty. Repression in the east may seem less anomalous because the west is now less tolerant of those who would use democratic freedoms to destroy democracy.

But the story is not simply one of convergence between western and eastern approaches to terrorism. There are a few things done in the east to protect the state that are not done in the west, notably Indonesia's use of treason charges and retroactive criminal laws and Singapore and Malaysia's use of internal security laws that allow their own citizens to be preventively detain with little meaningful judicial review. At the same time, there are some examples of the east not going as far as the west. For example, Indonesia's new anti-terrorism law rejects the idea, prominent in the United Kingdom's highly influential *Anti-terrorism Act, 2000*, that terrorism is a crime based on religious and political motive or that association with proscribed groups is itself a crime. More dramatically, the people of Hong Kong through extraordinary protests have defeated a security bill that would have provided new criminal offences of treason, subversion, sedition, separatism and association with proscribed groups. Such events raise the possibility that some of the more robust defences of democracy in a post-September 11 world may come from Asian countries that are themselves struggling for democracy and not from established western democracies who, perhaps overconfident about their democratic credentials, are now more intent on protecting democracy from a variety of internal and external threats. At the very least, it should disturb simplistic stereotypes about western preferences for freedom and rights and eastern preferences for collective security. This story, not of straight convergence or divergence, but of complexity and ambiguity creates a new space to debate the existence of libertarian and authoritarian strands in both western and eastern societies. [3]

In this paper, I will explore some selected western and eastern responses to September 11 and the new security imperative. I will first provide a brief overview of how Indonesia and Hong Kong have responded to the threat of terrorism and security concerns since September 11. Next, I will examine how Indonesia and Hong Kong and some western

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[2] James Gomez and Alan Smith "September 11 and Political Freedom: Asian Perspectives" in U. Johannen, A. Smith and J. Gomez *September 11 and Political Freedom: Asian Perspectives* (Singapore: Select Publishing 2003) at xxxi.

[3] Victor Ramraj "Terrorism, Security and Rights: A New Dialogue" [2002] Sing.J.L.S. 1.

countries, notably the United Kingdom and the United States, have defined threats to their security in their anti-terrorism laws. In particular, I will explore the implications of requiring proof of religious or political motive to convict a person of terrorism as required under the United Kingdom's highly influential *Terrorism Act, 2000* and the status of treason offences in the east and the west. Treason and other crimes based on the betrayal of the state figured prominently in Hong Kong's proposed security bill. In Indonesia, the Muslim cleric Bashir was convicted of treason and acquitted of actual involvement in various acts of terrorism. In contrast, treason has not been revived in the west even though there has been an increased emphasis on loyalty to the democratic state. In the United States, for example, treason charges have not been laid against American citizens who have literally assisted the enemies of their homeland. Western embarrassment about treason as a juridical concept[4] may reveal some of the limits of militant democracy. In other words, there may be some limits to the loyalty that democracies will demand of its citizens, at least in the juridical form of criminal offences, of its citizens. These limits are not restricted to the west, but may also have influenced first the people and then the government of Hong Kong recently to reject new treason, separatism, sedition and subversion offences even they were required by Article 23 of its Basic Law. In a modern world characterized by a neo-liberal states and the constant migration of people, capital and ideas, the very idea of undivided loyalty to a state may be under challenge and place some limits on the development of militant democracy.

In the next part of the paper, I will examine how some countries in the east and the west have responded to the threat of groups committed to terrorism. Drawing on its experience with the IRA, the United Kingdom has not hesitated to proscribe certain groups and make membership and association with such groups illegal. It is striking that the United Kingdom has taken such actions without even having to derogate from freedom of association as protected under the *European Convention on Human Rights*. The decision not to derogate from such rights when enacting the *Terrorism Act, 2000* was probably legally correct given the recent decision of the European Court of Human Rights that accepted that it was necessary in a democratic society to ban a popular Islamic party in Turkey on the

[4] George Fletcher *Romantics at War: Glory and Guilt in the Age of Terrorism* (Princeton: Princeton University Press, 2002) ch.6.

basis that the party was not committed to preserving democracy.[5] This European approach can, however, be contrasted with a more libertarian North American approach. In part because of concerns about violating the First Amendment's categorical guarantee of the right of peaceable assembly, the United States has not made it a crime for its citizens to be a member of a terrorist group. Canada, as usual halfway between the United Kingdom and the United States, has refused to make membership with a terrorist group a crime, but has enacted British style procedures for proscribing terrorist organizations. The situation in the east is even more complex and again betrays simplistic assumptions that the new security imperative will facilitate the expression of authoritarian Asian values. Indonesia has followed the more libertarian American example in its new anti-terrorism laws of not prohibiting organizations but, under intense western pressure after the Bali bombings, has convicted Bashir of treason in large part because he led an organization that advocated an Islamic state. Associational life is heavily regulated in Hong Kong, but a focal point of successful resistance to its proposed security bill was concerns that it would criminalize membership of groups prohibited in mainland China. The way that a country deals with organizations that may be committed to the dismantlement of democracy is a central dilemma of militant democracy.

The next problem to be discussed will be how democracies should respond to traumatic events such as the September 11 attacks or the Bali bombings with particular attention to the issue of whether retroactive laws can be justified. Indonesian anti-terrorism laws have been passed with retroactive effect and applied after the fact to convict and sentence to death some of those involved in the Bali bombing. The new post Soeharto-Indonesian constitution, however, prohibits retroactive laws, but this clause, even before Bali, was controversial in Indonesia because of concerns it could prevent accountability for military and state crimes committed in the past. Although western democracies have generally avoided enacting retroactive criminal laws after September 11, it will be suggested that the retroactivity issue is complicated by the fact that many new anti-terrorism laws in the west are enacted as a direct response to terrible acts of terrorism, challenging the spirit, if not the letter, of the legality norm against retroactivity. A democracy will remain vulnerable

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[5] *Case of Refah Partisi (The Welfare Party) and Others v. Turkey* (European Court of Human Rights, 13 Feb. 2003).

not only to terrible acts of terrorism, but also the urge to respond to such acts with drastic new laws.

The final problem of militant democracy to be discussed in this paper is the issue of preventive detention. To what extent can a democracy detain people on the basis that they may commit crimes in the future? Here again September 11 has hastened the process of breaking down simplistic and stereotyped dichotomies between the west and the east. To be sure, September 11 has encouraged Malaysia and Singapore to justify their internal security laws as necessary to deal with the threat of terrorism. Indonesia, however, has so far resisted reviving such laws because of concerns about their abuse during Soeharto's New Order regime. Its new anti-terrorism law has a limited provision for preventive arrest patterned after British and Canadian laws that authorize preventive arrests for periods of 7 and 3 days respectively. The United States has not enacted formal preventive arrest provisions, but this does not mean that preventive detention is not practiced by the United States. The United States has not only detained over 600 people at Guantanamo Bay, but has also declared two of its own citizens to be enemy combatants who can be detained indefinitely on American soil with the courts so far deferring to the executive determinations that they are dangerous enemies. In the immediate aftermath of September 11, immigration laws and material witness warrants were used in the United States to detain large numbers of Muslim men. Indeed, immigration laws are the western underbelly on the preventive detention issue as they provide for detention in circumstances that would not be tolerated for citizens. The significance of preventive detention in immigration law is increased by the fact that it is the form of law most likely to be experienced by those who come from potential democracies in Asia and elsewhere. Immigration law may be the great teacher and the message that it often sends is that western democracies are not willing to live up to their ideals of due process and equality. Those in the east and other regions struggling towards democracy may use this lesson either to legitimize their own forms of militant democracy or as a reason to be more democratic and tolerant than the established democracies.

I. The Dilemmas of Militant Democracy in Indonesia and Hong Kong

Indonesia and Hong Kong both constitute fascinating case studies of the dilemmas of militant democracy, namely the possible use of democratic freedoms to destroy democracy and the limits of what a democracy can do to protect itself. The fragility of both

democracy and security in Indonesia magnifies the dilemmas of militant democracy: namely the danger on the one hand that a democracy will allow its freedoms to be used to undermine democracy and the danger on the other hand that the state will take measures in the name of protecting democracy that will undermine its claims to be respected as a free, tolerant and open democracy.

Indonesia is the world's most populous Muslim country and it is attempting to preserve a fledging but fragile democracy and reject its repressive past under Soeharto. In 1999 elections were held and a year later, a bill of rights, largely patterned on the Universal Declaration of Human Rights, was added to the constitution. One observer has noted: "It was the first meaningful protection of human rights in Indonesia's 1945 Constitution and it represents a radical shift in Indonesia's constitutional philosophy from essentially authoritarian to a more liberal-democratic model."[6]

After September 11, Indonesia came under pressure from various international organizations to take more robust anti-terrorism measures. Although the military remains a formidable power in the country, the police and the courts are not generally well regarded. The United Nations Resolution passed while the fires had not yet died in the rubble of the World Trade Centre encouraged many countries to enact new anti-terrorism laws by the end of 2001. A draft Indonesian anti-terrorism law that would have defined terrorism as including politically motivated property damage or the creation of a sense of fear and would have created a new anti-terrorism task force from the police, army and state intelligence agency that could detain people for investigation without access to lawyers or contact with outsiders was withdrawn after extensive resistance from civil society groups. Concerns were expressed in Indonesia about reviving security laws and military power over law enforcement that had led to the detention of dissidents under the Soeharto regime.

There was also some resistance to the idea that terrorism was a problem in the country of 220 million despite evidence that a variety of groups, most notably Jemaah Islamiyah (JI), were prepared to commit acts of terrorism as part of their desire to de-stabilize the region as a prelude to forming a pan-Islamic state that would include Indonesia, Malaysia and the Philippines. Singapore and Malaysia did not hesitate to use their internal

security laws to place suspected members of JI into preventive detention, while Indonesia debated whether there was a terrorist threat and whether anti-terrorism measures were necessary. Singapore was soon rewarded with a new free trade agreement with the United States while some Indonesians expressed concerned that "while some of their more authoritarian neighbours have suddenly become the new darlings of Washington" in the new war against terrorism, "Indonesia is being orphaned because it is a messy, but real, democracy....Indonesians are worried they're hearing America shift again from a war for democracy to a war on terrorism, in which the US will judge which nations are with it or against it not by the integrity of their elections or the justice of their courts, but by the vigor with which their army and policy combat Al Qaeda." [7]

Kevin Hewison has argued that September 11 presents more of a threat to political than economic liberalism: "neo-liberal economic domination of the globalisation debate has overwhelmed and submerged the political positions of liberalism. These positions should be resurrected. International terrorism and the violent responses to it, suggest an urgent need to re-invigorate political liberal positions, at both the national and international levels...For Asian liberals, there is an urgent need to promote a new form of local and global political legitimacy associated with political ideas, values and institutions that are based on law, open and democratic, and that value self-determination, equality and justice. Post- 11 September such ideas and institutions will need to be stoutly defended, for populist politicians in Asia and elsewhere will be sorely tempted to marry illiberal and conservative political structures with 'liberal' economic regimes."[8] Indeed, there is a potential for the new security imperative to break any connection between economic and political liberalism. Countries that do not satisfy United Nations or American security standards find themselves vulnerable to economic penalties, either in the form of formal sanctions or less formal exemptions from favoured nation status. In Canada, for example, the imperative of keeping

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[6] Ross Clarke "Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials" (2003) 5 Asian Law 128 at 130. See also Tim Lindsey "Indonesian Constitutional Reform: Muddling Towards Democracy" (2002) 6 Singapore Journal of International and Comparative Law 244.

[7] Thomas Friedman "The War on What?" *New York Times* June 8 2002 as quoted in Kumar Ramakrishna "The US Foreign Policy of Praetorian Unilateralism and the Implications for Southeast Asia" in U. Johannen, A. Smith and J. Gomez *September 11 and Political Freedom: Asian Perspectives* (Singapore: Select Publishing 2003) at 139.

[8] Kevin Hewison "Globalisation: Post 9/11 Challenges for Liberals" in ibid at 20-21.

the border open for business with the United States has cast a long shadow on Canadian debates about the need for increased security measures since September 11. [9]

Indonesia took decisive actions against terrorism after it suffered its own mini-September 11. On 12 October 2002, bombings in Bali, killed over 200 people, many of them Australians. By the end of the month, a new anti-terrorism law was enacted as a Presidential emergency regulation or Perpu with retroactive force to the Bali bombings and Abu Bakir Ba'asyir, a radical Islamic cleric, was charged with treason for advocating an Islamic state and for alleged involvement in various acts of terrorism, but not the Bali bombings. The emergency regulation was subsequently enacted with few changes as a law by legislature or the Dewan Perwakilian Rakyat. The Indonesian experience of laws being enacted in the immediate aftermath of terrible acts of terrorism is quite common in democracies. At various junctures, both the United Kingdom and the United States have reacted to acts of terrorism with severe new anti-terrorism laws. This raises questions both about the vulnerability of democracies to terrorism and their tendency to take reactive rather than proactive measures, as well as the possibility of overreaction when laws are hastily enacted in the traumatic aftermath of terrorism.

The connection that democracies often draw between acts of terrorism and the inadequacy of their own laws also raises the question of when amendments to the formal law will stop. The United States strengthened its anti-terrorism laws after the Oklahoma City bombings only to strengthen them again with the *Patriot Act* in the immediate aftermath of September 11. One of the reasons why a widely rumoured *Patriot Act II* may not have yet been introduced may perhaps have been the fortunate absence of subsequent acts of terrorism on American soil. Indonesia has not been as fortunate, and subsequent to the Bali bombing, there was a second high profile act of terrorism- the bombing of the Marriott Hotel in Jakarta that killed 12 people in August of 2003. Predictably, there were new demands after the Marriott bombings that Indonesia's new anti-terrorism law should be supplemented with an internal security law similar to those used by neighbouring Singapore and Malaysia.[10] It is not clear that such an initiative will gain traction in the complex

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[9] See my *September 11: Consequences for Canada* (Montreal: McGill Queens Press, 2003) ch.6.
[10] The idea was raised by Defence Minister Matori Abdul Djalil , Susilo Bambang Yudhoyoni, co-ordinating Minister for political and security affairs and General Sutarto, but was also opposed by a number of human

Indonesian political environment, but it demonstrates the demand in both the west and the east for "increasing dosages" of security.[11]

In the aftermath of the Marriott bombings, the Muslim cleric Bashir was acquitted of involvement in prior acts of terrorism in Indonesia but convicted of treason for advocating an Islamic state.[12] He was sentenced to four years in prison which was less than the nine year sentence for the treasonous act of advocating an Islamic state that he received in the 1980's under Soeharto and less than the death sentence received by Amrozi, the so-called smiling terrorist, and a number of others who have been convicted of the Bali bombings under the retroactive law. [13] Bashir's treason conviction and sentence was a matter of great controversy. It was clearly too little for many in the west who maintain that Bashir is associated with the JI and through that with Al Qaeda. At the same time, the treason conviction, despite its relatively lenient sentence, may have been too much for many in Indonesia because of its similarities with the use of similar charges under Soeharto and because of the significant support that Islamic political parties are starting to receive in that country. The treason conviction is also anomalous given the reluctance of other democracies to revive ancient treason laws to deal with the threat of terrorism.

Hong Kong was a good candidate in Asia to join Indonesia in the revival of the ancient law of treason based on a vision of undivided loyalty to the state. Article 23 of Hong Kong's Basic Law provides that it is obliged to prohibit "any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies"[14] This obligation to enact laws demanding loyalty to the Central People's Government was secured by China in the immediate aftermath of the use of military force against the pro-democracy protests of Tiananmen

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rights activists in Indonesia. See Tony Sitathan "Maelstrom over Indonesia's anti-terror bill" 26 Aug. 2003, Asia Times Online.

[11] Oren Gross "Cutting Down Trees: Law-Making Under the Shadow if Great Calamities" in *The Security of Freedom* at 50

[12] The verdict of the five judges of the Jakarta court was confusing and took 7 hours to read. They concluded that Bashir's "initial implementation of subversion had been proven by the existence of efforts by JI to set up an Islamic state." A'an Suryana "Ba'asyir gets four years" *Jakarta Post* 3 Sept 2003.

[13] "In setback for U.S. Indonesian cleric cleared of terror charges" *New York Times* 2 Sept. 2003; Ba'asyir gets four years" *Jakarta Post* 3 Sept. 2003.

[14] Hong Kong Basic Law Article 23

Square and the large protests in Hong Kong of the killings. It was the most contentious issue in the handover of Hong Kong and was an anomalous feature in a Basic Law that otherwise contained many of the rights protection provisions of the International Covenant on Civil and Political Rights and promised that two systems would be maintained even after the Hong Kong and the mainland became one country.

Unlike Indonesia, Hong Kong enacted a new anti-terrorism law, the *United Nations (Anti-Terrorism Measures) Ordinance*[15] in the immediate aftermath of September 11. This law was influenced by the broad definition of terrorism in the United Kingdom's *Terrorism Act, 2000* and Canada's 2001 *Anti-terrorism act*, including their requirements that terrorism be defined as a crime committed "for the purpose of advancing a political, religious or ideological cause" against not only life, but also against property, electronic systems and essential private or public services. Such new anti-terrorism laws were based on a very different vision of security than contemplated in Article 23. The focus was not so much on loyalty to the state but to a broad range of harms that could result from political or religious extremism. The inspiration for this new form of security in Hong Kong came from the United Kingdom and not China. The Hong Kong law was not, however, a complete knock off from the British law. Following the Canadian law, it excluded from its definition of terrorism "the use or threat of action in the course of any advocacy, protest, dissent or industrial action" and even went beyond the Canadian law in extending that exemption to actions that threatened public health or safety. This minor tweaking of the new vision of security was the first sign that Hong Kong, struggling for greater democracy in the shadow of China, might be prepared to defend democratic freedoms such as mass protests and strikes in a more robust way than many of the established western democracies.

In 2002, the government of Hong Kong introduced a security bill to implement its obligations under Article 23 of the Basic Law. The security bill was in part inspired by crimes against subversion, sedition and secession found in the Criminal Code of the People's Republic of China. Concerns were raised that support in Hong Kong for the independence of Tibet could be prosecuted under the bill. The security bill prohibited the commission of subversion and secession by "serious criminal means" with the definition of serious criminal means taken from Hong Kong's anti-terrorism law, minus the exemption

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[15] Cap 575

for strikes and protests. A particularly contentious provision provided for the banning of organizations that were subordinate to organizations prohibited by the Central Authorities of the People's Republic of China. Concerns were raised that such a provision would allow Hong Kong's security concerns to be defined on the mainland and that groups such as Falun Gong could end up prohibited in Hong Kong. On 1 July 2003, an estimated half a million people in Hong Kong took to the streets to protest the security bill despite attempts by the government to keep people away from the protest by providing free admission to air conditioned movie theatres.[16] The demonstration was the largest in Hong Kong since the Tiananmen Massacre and led the government to propose amendments to the security bill, including the deletion of the provision allowing organizations subordinate to those banned on the mainland to be prohibited on that basis. The amendments, however, did not calm public concerns about the bill and in September 2003, the government of Hong Kong was forced to withdraw the security bill.

This brief overview of recent events in Indonesia and Hong Kong reveals the complexity of eastern responses to the new security imperative. On the one hand, both Indonesia and Hong Kong have enacted new anti-terrorism laws with a number of problematic features that will be discussed in later parts of this paper. On the other hand, there have been defences of democratic freedoms in both countries that do not fit comfortably into the thesis that western responses to September 11 would facilitate authoritarianism in the East. Indonesians resisted the imposition of a repressive draft anti-terrorism law and the present anti-terrorism law has restraints not present in the original version. Hong Kong's anti-terrorism law has some protections for protests that are not present in the British and Canadian laws on which it is based. The people of Hong Kong have successfully resisted for the time being a new security law despite the obligation that China secured that it enact new offences relating to treason, subversion, secession, sedition and foreign political organizations. Indonesia has not yet responded to demands that it introduce a preventive detention regime similar to the internal security laws of Singapore and Malaysia despite continued acts of terrorism after a new anti-terrorism regulation was enacted with retroactive application to the Bali bombings. To be sure, Indonesia and Hong Kong have not been immune from the new security imperative, but some of their

[16] Keith Bradsher "Security Laws Target of Huge Hong Kong Protest" *New York Times* 2 July 2003.

experiences suggest that countries struggling for democracy may, at times, be less willing to sacrifice democratic freedoms in the name of protecting democracy than western countries with established democratic credentials.

II. Defining Threats to Security

a) The Relevance of Religious or Political Motives to Terrorism

The most influential template for post-September 11 anti-terrorism laws was the United Kingdom's *Terrorism Act, 2000*.[17] This law was enacted with all party approval before September 11 as a means to consolidate and expand on various anti-terrorism laws that were enacted, initially as emergency measures, to deal with the terrorist violence of the Irish Republican Army. In a sort of "bricolage"[18], this new law was what was at hand when policy-makers in many other countries turned to the task of drafting new anti-terrorism laws in the aftermath of September 11.

Section 1 (1) of the U.K. act defines terrorism as actions or threats that are "designed to influence the government or to intimidate the public or a section of the public" and "made for the purpose of advancing a political, religious or ideological cause" and includes not only serious violence against a person and danger to life, health or safety, but also serious damage to property and serious interference with an electronic system. The breadth of this new definition can be seen by comparing it with other definitions of terrorism. For example, Article 2(1) of the 1999 *International Convention for the Suppression of the Financing of Terrorism* defines terrorism in part as acts "intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act." The Supreme Court of Canada adopted this more limited definition of terrorism from international law to apply to an undefined reference to terrorism in Canada's immigration laws. Although it noted that Parliament was free to adopt a different definition of terrorism, it also argued that above definition "catches the essence of

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[17] Chapter 11.

[18] On the applicability of this term, borrowed from the work of Claude Levi-Strauss, to comparative constitutional law see Mark Tushnet "The Possibilities of Comparative Constitutional Law" (1999) 108 Yale L.J. 1225; David Schneiderman "Exchanging Constitutions: Constitutional Bricolage in Canada" (2002) 40 Osgoode Hall L.J. 401.

what the world understands by 'terrorism'".[19] Both the British and Canadian Parliaments have indeed enacted a different and much broader definition of terrorism.

The requirement of proof of political or religious motive for acts of terrorism goes against the traditional criminal law principle that the accused's motive is not an essential element of an offence. [20] It is also not in accord with definitions of terrorism taken from international instruments which generally do not require proof of political or religious motive as an essential element of crimes of terrorism. Including political or religious motive as an element of terrorism means that police and prosecutors will be derelict in their duties if they do not collect evidence about a terrorist suspect's religion or politics. In my view, this presents a threat to liberal principles that democracies do not generally inquire into why a person committed a crime, but only whether he or she acted intentionally or with some other form of culpability. It also may have a chilling effect on those whose political or religious views are outside of the mainstream and perhaps similar to those held by terrorists. Investigations into political and religious motives can inhibit dissent in a democracy. In response to such concerns, voiced by its strong multicultural community, Canada added a clause to its definition of terrorism stating that "the expression of a political, religious or ideological thought, belief or opinion" will not by itself constitute a terrorist activity.[21]

Hong Kong followed the British law when it drafted its post-September 11 anti-terrorism law. Hong Kong's *United Nations (Anti-Terrorism Measures) Ordinance* [22] defines a terrorist act as the use of threat of an action that:

A) causes serious violence against a person;
B) causes serious damage to property;
C) endangers a person's life, other than that of the person committing the action;
D) creates a serious risk to the health or safety of the public or a section of the public;
E) is intended seriously to interfere with or seriously to disrupt an electronic system; or

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[19] *Suresh v. Canada* 2002 SCC 1 at para 98
[20] *R. v. Kingston* [1995] 2 AC 355; *United States of America v. Dynar* [1997] 2 S.C.R. 462.
[21] Canadian Criminal Code s.83.01(1.1) as amended by The Anti-Terrorism Act S.C. 2001 c.41.
[22] Cap 575

F) is intended seriously to interfere with or seriously to disrupt an essential service, facility or system, whether public or private; and

ii) the use or threat is

A) intended to compel the Government or to intimidate the public or a section of the public; and

B) made for the purpose of advancing a political, religious or ideological cause.

The influence of the definition of terrorism in the British *Terrorism Act, 2000* is obvious. The prohibited harms are virtually identical with the exception of the reference to the disruption of essential public or private services, taken from Canada's *Anti-terrorism act* of 2001. As with the British and Canadian definitions of terrorism, Hong Kong's law requires proof not only of an intention to compel government or intimidate the public, but also proof of a political or religious motive. The Hong Kong law demonstrates how many countries are susceptible to adopting definitions of terrorism taken from western laws despite concerns within those countries that the definitions are overbroad, illiberal and a departure from normal standards.

Hong Kong's anti-terrorism law did, however, depart from the British template in an important and more liberal way. It followed the Canadian law in providing that politically motivated threats or actions that disrupted essential public or private services or electronic systems would not be considered terrorist acts if made "in the course of advocacy, protest, dissent or industrial action." This followed an exemption made in Canada's *Anti-terrorism act* [23] but actually was more liberal than the Canadian law because the Hong Kong exemption extended to strikes and protests that would create a serious risk to the health or safety of the public or any segment of the public.

Perhaps surprisingly given that its new anti-terrorism law was rushed through the Congress with little opposition shortly after the terrible terrorist attacks of 11 September 2001, the United States defined terrorism in a more restricted and more precise manner than either the United Kingdom or Hong Kong. Both international and domestic terrorism are defined under the *Patriot Act* as "violent acts or acts dangerous to a human life" that would violate American laws and which "appear to be intended to intimidate or coerce a civilian

population, or to influence the policy of a government by intimidation or coercion or to affect the conduct of a government by mass destruction, assassination or kidnapping."[24] This definition does not require proof of political or religious motive. It allowed American judges trying offences of providing assistance to terrorism to maintain "we don't convict people for their thoughts or what they read."[25]

In its initial draft anti-terrorism law, Indonesia defined terrorism as actions "having political background and or motives in the form of the following:

a) causing danger and the threat of danger for other person's lives;
b) destroying property;
c) removing the personal freedom; or
d) creating a sense of fear in society at large.[26]

In a sense, the original Indonesian draft resembled the British approach both in its broad definition of terrorism[27] and in its idea that political motivation was the distinguishing feature of terrorism. As suggested above, such an approach creates a danger that those who share the politics of terrorists may also be liable to investigation as potential terrorists and that a democracy will go beyond its legitimate need to punish violence regardless of the offender's motive to punishing people more harshly because their crimes were motivated by their politics or religion.

The above draft anti-terrorism law was withdrawn in Indonesia after civil society groups expressed fears that people could, as under the Soeharto regime, be prosecuted and detained because of their politics and religion. The eventual Indonesian anti-terrorism law, both as enacted as an emergency regulation or perpu and subsequently as a law, firmly rejected the approach taken in the initial draft by providing:

> The criminal acts of terrorism stipulated [in this regulation or law] are neither political criminal acts, criminal acts relating to political crimes, criminal acts with

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[23] Criminal Code of Canada s.83.01(1)(b)(I)(E). The exemption as originally introduced in Canada only applied to legal protests and strikes but the requirement of legality was dropped in Canada after much protest from civil society groups. See generally my *September 11: Consequences for Canada* ch. 3.

[24] Patriot Act s. 801 amending 18 USC s.2331 (international terrorism) and 18 USC s.2331 (domestic terrorism)

[25] "Judge grapples with motive of Lackawana Six" *Toronto Star* 4 Oct. 2002.

[26] Article 1 of Withdrawn Draft. The translations of the withdrawn draft, the perpu or emergency law and the final law in Indonesian were provided to me by ELLIPS who I thank for allowing me to visit Indonesia on two occasions to speak to the working group drafting the anti-terrorism law.

[27] Although to be fair, the *Terrorism Act, 2000* does not define terrorism as broadly as the creation of fear in society.

> political motives, and criminal acts with political purposes to obstruct the extradition process.[28]

The focus in the actual definition of terrorism in the Indonesian law was on the harms caused by terrorism and not the motives for causing those harms. This represented a more liberal approach than found in the British law or laws patterned after the British law including those of Hong Kong and Canada.

One of the concerns about including political or religious motive as an essential element of the crime is that it may indirectly sanction discrimination against those who have the same politics and religion as the terrorists. The Indonesian anti-terrorism regulation and law accompanied its rejection of religious and political motive with a clause that affirmed a commitment to non-discrimination. Article 2 provides:

> The eradication of criminal acts of terrorism under this Law shall be a set of policies and strategic steps to strengthen the public order and safety by remaining committed to upholding the law and human rights, non-discriminative in nature in respect of ethnicity, religiosity, race or groups. [29]

To be sure, such symbolic affirmations of non-discrimination can co-exist with state actions that single out groups on the basis of their race, politics or religion for heightened scrutiny. For example, a "sense of Congress" statement in one of the first sections of the *Patriot Act* that "the concept of individual responsibility for wrongdoing is sacrosanct in American society, and applies equally to all religious, racial and ethnic groups" [30] rings somewhat hollow in light of the widespread investigation and detention of Muslim men after September 11 in the United States. General Sutarto of the Indonesian military has argued that Indonesia's anti-terrorism law could be expanded to allow "preemptive measures against terrorist attack" in part because the anti-terrorism law "would accommodate political freedom, since it would be apolitical in nature."[31] Symbolic affirmations that the terrorism laws will not be applied in a political or discriminatory manner are vulnerable to abuse. Nevertheless, symbols do have some value and it is significant that both Indonesia and the United States affirmed its commitment to non-discrimination in their new anti-terrorism

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[28] Article 5 of Perpu and Law
[29] Article 2 of Law and Perpu
[30] *Patriot Act* s.102.
[31] Tony Sitathan "Maelstrom over Indonesia's anti-terror bill" 26 Aug. 2003, Asia Times Online.

laws while other countries such as the United Kingdom and Canada, failed, even at the symbolic level, to do so. [32]

b) The Relevance of Treason

One interesting feature of the increased emphasis on security in the west in the wake of September 11 is that it has not seen a revival of treason or sedition offences as a means of enforcing loyalty to the state. To be sure, such offences remain on the books in many western countries but they have become something of a dead letter even when they could be applied to those who have, literally, fought against their country and given assistance to its enemies.

In the United States, treason is defined but limited in its 1787 constitution. Article III section 3 provides that "treason against the United States shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort". This language is still found in the federal crime of terrorism which applies to those "owing allegiance to the United States" and applies to acts of aid or comfort "within the United States or elsewhere".[33] Congress was given the power in the American Constitution to determine the punishment for treason, but "no Attainder of Treason shall work Corruption of Blood, or Forfeiture excepting during the Life of the Person attainted." [34] The maximum penalty for treason in the United States is the death penalty and the archaic offence of misprison of treason -committed by not telling the President or a judge of a person's knowledge of about the commission of treason - is still on the books and punishable by up to 7 years imprisonment.[35] The old offence of treason represents an extreme of militant democracy. The individual owes the state undivided loyalty and assistance in battling both internal and external enemies.

Although treason can be seen as an expression of militant democracy and treason offences remain on the books in most western democracies, they are becoming something of an archaic and dead letter. As George Fletcher has recently pointed out, John Walker Lind, the American who joined Taliban forces in Afghanistan and fought against American forces,

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[32] Both the United Kingdom and Canada after September 11 did strengthen hate crime provisions but as discussed in a subsequent part of this paper, such new crimes do not address the danger of discrimination by the state.

[33] 18 USC s.2381.

[34] American Constitution Art. III s.3.

was not charged with treason, even though he was guilty of treason in the most basic sense of waging war against his country and even though sentiments of patriotism and loyalty to country are extremely intense in the United States. [36] Terrorists in Canada who committed murder and kidnapping in support of the cause of Quebec independence were not charged with treason even though their actions arguably fell within the Canadian definition of treason as the use of "violence for the purpose of overthrowing the government of Canada or a province".[37] More recently, treason charges were not laid against a British MP George Galloway who called on British troops to disobey Iraq or against the American soldier who is alleged to have communicated information from the detainees at Guantanamo Bay to the government of Syria.[38]

The western reluctance to prosecute people for treason may reflect what Professor Fletcher argues is a certain modern embarrassment about the crime of treason. He argues that treason is based on the romantic ideal of loyalty to the state and the collective guilt of a foreign enemy. Although these romantic and emotional ideas are alive and well in public discourse, they remain anomalous in legal discourse where the focus is often on specific acts of violence and individual responsibility.

An attempt was made in the Hong Kong security bill to modernize the offence of treason. It proposed to take away the old language of killing or wounding or deposing Her Majesty and replace it with reference to a Chinese national's intentional attempts to overthrow the Central People's Government or to intimidate such a government or to compel it to change its policies or measures. The security bill also proposed to abolish the common law offences of misprison and compounding treason. It also proposed to abolish the old notion that any overt act that manifests an intention to commit treason is a sufficient prohibited act for a treason conviction. The result would have been a narrower offence of treason than exists on the books many democracies. But despite the attempts to modernize the offence of treason, the security bill was rejected by the people of Hong Kong. They did not accept that they owed the Central People's Government such undivided loyality.

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[35] 18 USC s. 2382.

[36] George Fletcher *Romantics at War: Glory and Guilt in the Age of Terrorism* (Princeton: Princeton University Press, 2002) ch.6.

[37] *Criminal Code of Canada* s.46(2)(a)

[38] "British MP at Centre of Political Storm" *Toronto Star* 12 May 2003; "Airman is charged as a spy for Syria at Guantanamo" *New York Times* 23 Sept. 2003.

Treason has become an old and archaic offence in a modern world of rapid movement of people between states and the inevitable multiple allegiances that are created in a multicultural world characterized by extensive migration.

Treason is not, however, a dead letter in Indonesia. In the immediate aftermath of the Bali bombings, the Muslim cleric Bashir was charged with treason and involvement with various acts of terrorism committed before the Bali bombings. He was often alleged to be a spiritual leader of the JI, a group said to be associated with al Qaeda, with ambitions for an Islamic state in the region. Bashir was acquitted of involvement of terrorism but convicted of treason, primarily for the offence of advocating an Islamic state. The Bashir verdict was controversial. There was disappointment in the west that the cleric was not convicted of involvement in terrorism and the sentence was not higher. Ignoring the fact that Bashir was not charged in relation to the Bali bombings, Australian Prime Minister John Howard expressed disappointment with the verdict on the basis that "many of us here in Australia believe that he was at least then spiritual leader of Jemaah Islamiyah and therefore at least knew about the attack in Bali, we are disappointed that he wasn't convicted on that and didn't get a longer sentence."[39] Some Indonesian leaders cited the conviction as proof that they were taking terrorism seriously, but the fact that the conviction was based on the treasonous act of advocating an Islamic state must have been unsettling given opinion polls that indicated that most Indonesians would not object to the introduction of Sharia and the existence of political parties committed to that cause. [40] The conviction of Bashir for treason also raised concerns about civil liberties and religious freedom. Bashir was convicted of the same offence of treason under Soeharto's New Order regime and was sentenced to nine years imprisonment. Finally, Bashir's treason conviction may also have confirmed for some Indonesians an impression that the war on terrorism is a war on Islam. A recent focus group

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[39] "Indonesia Trial Ruling Seen as a Compromise" *New York Times* 3 Sept 2003.

[40] A recent poll showed in Indonesia indicated that 60% of those questioned would not object to the introduction of Sharia and that a new political party, the Justice Party, has made the introduction of Sharia one its main planks. Jane Perlez "Once mild, Islam looks harsher in Indonesia" *New York Times* 3 Sept 2003. This report, however, was disputed by Indonesian specialists who argued that in the 1999 elections, parties favouring an Islamic state won only 14% of the vote, a figure that they maintain has held constant today with 75% of Indonesians polled supporting parties that do not support an Islamic state. William Liddle and Saiful Mujani "The Real Face of Indonesian Islam" *New York Times* 11 Oct. 2003.

of Indonesians cited the treatment of the cleric Bashir as one of the main grievances against the United States.[41]

III. Restrictions on Associational Life

Section 11 of the United Kingdom's *Terrorism Act, 2000* makes it an offence to be a member of a terrorist organization or to profess to belong to a proscribed organization. It is a defence if the person can establish that the organization was not proscribed by the Secretary of State when he or she joined or that the person has not taken part in the activities of the organization at any time while it was proscribed. There is a procedure for appeal of a proscription decision to a commission with the Orwellian title of the Proscribed Organization Appeal Commission and to the courts. There is no requirement that the organization be notified or heard before it is listed. A leading authority on British anti-terrorism law has concluded that "domestic judicial review is unlikely to pick up anything other than disastrously and patently ill-founded cases or ill-argued cases."[42]

There is also a broad range of offences that attach to involvement with illegal or proscribed terrorist organizations. These include inviting financial or other support for a proscribed organization, arranging a meeting to support the organization or a meeting that will be addressed by a member of the proscribed organization.[43] It is also on offence to wear clothing that arouses "reasonable suspicion that he is a member or supporter of a proscribed organization."[44] Such offences would seem to be a prima facie violation of freedom of association under Article 11 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. Offences that make it illegal to profess to be a member of a proscribed organization, arrange a meeting of the organization or wear clothing associated would a proscribed organization also seem to violate freedom of expression under Article 10. Nevertheless, the British government is confident that the above offences are justified on the basis that they are prescribed by law and are necessary in a democratic society in the interests of national security or public safety or for the prevention of disorder or crime. Although it has been prepared to derogate from the European Convention to

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[41] Jane Perlez "U.S. asks Muslims why it is unloved, Indonesians reply" *New York Times* 27 Sept 2003.
[42] Clive Walker *Blackstone's Guide to the Anti-Terrorism Legislation* supra at 61.
[43] Terrorism Act, 2000 s.12
[44] ibid s.13.

protect its anti-terrorism laws in the past, the United Kingdom has not sheltered these offences with a formal derogation of rights under Article 15 of the European Convention.

There are grounds to believe that the European Court of Human Rights may be willing to accept such offences as a necessary limit on rights and as a means for democracy to protect itself from those who would destroy democracy. The Grand Chamber of the European Court of Human Rights has recently upheld the prohibition of a popular Islamic political party in part on the basis "that sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention" and that " a political party whose leaders incite violence or puts forth a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognized in the democracy cannot lay claim to the Convention's protections against penalties imposed on those grounds.'[45] To be sure, the impugned law in the case concerned the regulation and dissolution of political parties and not a criminal offence and resulting imprisonment for membership in a political party or a proscribed organization. Nevertheless a court that was willing to accept the banning of a political party because it was committed to the implementation of sharia would most likely uphold offences related to membership in a terrorist group. No emergency and temporary derogation from rights would be required.

There is a danger that courts may too quickly defer to governmental claims that prohibiting organizations and membership in organizations are necessary in the interests of national security and public order. Such offences represent a direct and massive infringement of freedom of association and expression. Threats to both national security and public order can be addressed in a more proportionate means by offences that target attempts and conspiracies to commit specific crimes. Nevertheless, there is a danger that judges will give great weight to the fact that national security is a valid reason for limiting rights and will not demand rigourous proof of the necessity and proportionality of each security measure. This may be part of a phenomena that Doreen McBarnet has called due process being for crime control.[46] By this she means that the laws such as the European Convention that are designed to protect the rights of the accused also legitimize the state's

[45] *Refah Partisi (The Welfare Party) and others v. Turkey* at paras 123, 98 13 February 2003.
[46] Doreen McBarnet *Conviction: The Law, the State and the Construction of Justice* (London: MacMillan, 1981).

interests in crime control and national security. The same vague concepts of proportionality and necessity that are designed to protect rights can also be used to limit them.

There is nothing stopping the independent judiciary from taking a more demanding approach and invalidating executive decisions to proscribe a particular organization or indeed the whole process of proscribing organizations and punishing people for belonging, associating or supporting an organizations. Judges could determine that the harm of such offences to freedom of association and expression are disproportionate to their values in stopping crime when compared to the less drastic alternatives of punishing people when they illegal conspire or counsel the commission of crimes. As President Barak of the Supreme Court of Israel has eloquently argued, the fact that judicial decisions may restrain the ability of the state to protect its security "is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security."[47] But in the present climate of militant democracy, as represented by the Turkish welfare party case, it is unlikely that judges will do so.

In contrast to the British, the United States has not made membership or participation in a terrorist group a crime even after September 11. This raises an interesting issue about the style of rights protection in the United States compared to Europe and other countries which follow the post World War II model of rights protection. The 18th century American Bill of Rights is at least rhetorically articulated in absolutist terms. The First Amendment provides "Congress shall make no law …abridging the freedom of speech…or the right of the people peaceably to assemble". In contrast, modern post-World War II bills of rights including the European Convention contemplate that reasonable and necessary limits on freedom of expression and association can be prescribed by law and justified to the judiciary. Governments under such regimes stress that their new security laws are consistent with their bills of rights. Indeed, the claimed consistency of such measures is often a point of pride. The new anti-terrorism laws are proposed as permanent measures that will be subject

to rights protection instruments as opposed to emergency measures that override or derogate from rights. There are serious concerns that neither modern bills of rights or the judiciary may provide adequate protection for freedom of association and expression. There will be a temptation for the judiciary to be more willing to accept reasonable limits on rights in a post-September 11 world. The American judiciary will not be immune from this temptation, but traditions of respect for a more or less absolutist understanding of freedom of expression and association has so far prevented the United States from making membership in a terrorist organization or mere association with a terrorist organization a crime. There is a possibility that modern bills of rights with their invitation to justify permanent limitations on rights may provide a greater threat to rights than more absolutist rights protections measures or those which require the declaration of a temporary state of emergency in order to derogate from rights.

An interesting gloss will be whether terrorist crimes tied to membership in an organization or inviting support for a proscribed organization[48] can be challenged under Article 14 of the *European Convention* which provides that rights such as freedom of expression and association "shall be secured without discrimination" on the grounds of "religion, political or other opinion, national or social origin". There is fear in some communities that official lists of terrorist groups may be developed in a manner that unfairly targets certain religions and people from certain groups. The European Convention does not provide for proportional limits on its relatively narrow right to equality and it may be that a court could impose equality as a trump value when it was reluctant to take an absolutist approach to freedom of expression or freedom of association. In a sense this was the approach taken by the United Kingdom's Special Immigration Appeals Tribunal when it held that the United Kingdom's derogation from fair trial rights in the *Anti-terrorism act, 2001* was not sufficient because the regime discriminated against the rights non-British citizens.[49] On the other hand, the difficult of proving an equality violation in the context of executive decisions to proscribe groups should not be underestimated. The government will

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[47] *Public Comm Against Torture in Israel v. Govt, of Israel* per President Barak as quoted in Aharon Barak "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 Harv.L.Rev. 16 at 148.
[48] *Terrorism Act, 2000* c.11 s.12.
[49] See Helen Fenwick "The Anti-terrorism, crime and security act, 2001: A Proportionate Response to September 11?" (2002) 65 Mod.Law Rev. 724 at 762.

argue that it is prohibiting organizations or detaining people not because of their religion, political opinion or nationality but because of international intelligence and evidence linking them with terrorism.[50] Equality has a potential to be a trump value that is more powerful than freedom of expression or freedom of association, but even equality may not prevail over the new security imperative.

As with its broad definition of terrorism including its requirement of proof of religious or political motive, the British approach to proscribing groups associated with terrorism has proven popular in many other democracies. Canada, Australia, New Zealand and Hong Kong, for example, all allow the executive to proscribe certain organizations as a terrorist group. In many countries including Canada and Hong Kong, there are also provisions that enable organizations and persons designated as such by the United Nations Security Council to be listed as terrorists. Such listings may, depending on the precise laws in the jurisdiction, make membership or participation in such organizations or financial dealings with such organizations illegal. The fact that the United Nations compiles long lists of such terrorists lends credibility and legitimacy to the listing process despite the fact that a person or organization routinely receives no hearing before the decision-maker before being listed and stigmatized as involved in terrorism. Indeed, in many countries, the listing process occurs under laws with the apparently innocuous and benevolent title of United Nations acts or ordinances.[51]

Indonesia has been much closer to the more libertarian American approach to associational life than the more restrictive approach contemplated by the Turkish welfare party case. Even the first and most draconian draft of Indonesia's anti-terrorism law did not provide for a procedure that would make organizations and membership or participation in organizations illegal. The exact rationale for the Indonesian reluctance to criminalize organizations is not known, but may be related to concerns about reviving the type of security apparatus that characterized the Soeharto regime. The closest that the Indonesian law comes to prohibiting organizations is a sentencing provision that provides that when an corporation, defined as an group of organized persons whether or not incorporated as a legal

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[50] See the reversal of the Board's decision in *A, X.Y v. Secretary of State for the Home Department* [2002] ECWA Civ. 1502..

[51] See for example Hong Kong's *United Nations (Anti-Terrorism Measures) Ordinance* cap. 575 and Canada's *United Nations Act* R.S. c.U-3.

entity, is found guilty of a criminal act of terrorism, it shall be dissolved and declared "a banned corporation."[52] The Indonesian scheme, unlike the British scheme, at least requires the group to be guilty of a terrorist act before it is banned.

The potential for Indonesia to take a more liberal approach to issues such as the definition of terrorism or the banning of organizations should only surprise those who accept the stereotypes of Asian values as inevitably favouring the collective over the individual. As Anthony Langlois has argued:

> The purveyers of the package deal of Asian values all too often reduce culture to the state, and then proceed to use this 'culture' or set of values as a device for delegitimizing internal or indigenous critics of the regimes in question, aided by the use of draconian legislation such as the Internal Security Acts of Malaysia and Singapore. That the state elites have to *impose* their interpretation of Asian culture on their populations...ironically suggests that the cultural construct they are using is not at all universal or representative of a homogenous culture.[53]

Even under the Soeharto regime, Indonesians were not loathe to criticize Western nations for hypocrisy for not living up to their own human rights inspirations. For example, Wiryono, who served as Indonesia's Ambassador to Australia, "expressed 'surprise' at the ease with which Australians accused Indonesia of human rights violation, especially given Australia's track record with Aboriginal peoples and the Asian immigration debate".[54] To be sure there is much that is both opportunistic and unsatisfying in attempting to justify atrocities such as those committed in East Timor on the basis of historical injustices and even contemporary prejudices in the West. Yet at the same time, the ability of developing countries to hold up a critical mirror to the west should not be underestimated. Assertions in the developing world of commitments to an international culture of human rights is a relatively benign form of anti-Americanism.

One feature of Indonesia's anti-terrorism law seems particularly designed both to affirm its commitment to human rights values and to underline limitations in the United States' commitment to such values. The death penalty is available for the most serious

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[52] Article 18. Note that corporations are defined in Article 1.
[53] Anthony Langlois *The Politics of Justice and Human Rights Southeast Asia and Universalist Theory* (Cambridge: Cambridge University Press, 2001) at 27-28 (emphasis in original)
[54] Ibid at 19

crimes of terrorism under Indonesian law, despite concerns that the risk of wrongful convictions may be increased in the terrorism context.[55] One article of the Indonesian law, however, provides that the death penalty "shall not be applicable for perpetrators of criminal acts of terrorism under the age of 18 years of age." [56] This follows article 6(5) of the International Covenant on Political and Civil Rights which prohibits the use of the death penalty on pregnant women and those who committed crimes when they were below the age of 18 years. The only countries which still execute people for crimes committed as juveniles are Iran, Nigeria, Pakistan, Saudi Arabia, United States and Yemen. This provision in Indonesian anti-terrorism law can be explained in part as a criticism of increasing American exceptionalism on the use of the death penalty. For example, the death penalty is being sought against a teenager accused of the Washington sniper shootings under a Virginia anti-terrorism law and may well be sought against a Canadian teenager detained at Guantanamo Bay who is alleged to have killed an American soldier on the border between Afghanistan and Pakistan. Indonesia's refusal to execute juvenile terrorists is both a commitment to an international human rights culture and an implicit rebuke of the United States for, on this issue at least, rejecting that culture.[57]

The banning of organizations was a controversial feature of Hong Kong's proposed security bill. The bill proposed amendments to Hong Kong's *Societies Ordinance* which requires associations of people to be approved by the executive branch of government and provides various offences for being a member or attending a meeting of a proscribed organization. The security bill as originally introduced would have amended the *Societies Ordinance* to allow the Secretary of Security to proscribe organizations that have as one of their objectives the commission or attempted commission of treason, subversion, secession, sedition or spying. In an attempt to make such procedures rights compliant, the Secretary of Security was required to determine that the proscription of any organization was "necessary in the interests of national security and is proportionate for such purpose."[58] Such a

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[55] For a decision holding that the Anglo-American experience of wrongful convictions, including those in the Irish cases in the United Kingdom, makes extradition without assurances that the death penalty would not be applied unconstitutional see *United States v. Burns and Rafay* [2001] 1 S.C.R. 283.
[56] Article 19 of perpu and law
[57] For a statement by the United States Supreme Court that the International Convenant on Civil and Political Rights is not relevant because "it is American concepts of decency" that are at issue see *Stanford v. Kentucky* 492 U.S. 361 at 369 n.1.
[58] *Societies Ordinance* s.8A(1).

formulation was designed with the limitation provisions of the *International Covenant on Civil and Political Rights* in mind. Courts might well be tempted to defer to a prior executive determination that a proscription of a group was both necessary for national security and proportionate to the threat. Lord Hoffman in a postscript to a decision added after September 11, made the case for judicial deference to the executive in national security matters on the basis not only that the executive "has special information and expertise in these matters", but also that national security decisions made by the executive "require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom the people may remove."[59] Regardless of normative arguments that Lord Hoffman's case for judicial deference is unsound[60], it is an indication that courts may well defer to executive determination of security needs and in doing so may give such decisions a degree of legitimacy that they might not deserve.

Hong Kong's security bill also allowed organizations to be prohibited on the basis that they were subordinate to a mainland organization that had been prohibited by an open decree of the Central Authorities under the law of the People's Republic of China. This provision was especially controversial in Hong Kong because it was perceived as an incursion on the one country two systems accommodation and as a means for the mainland to impose its views on security matters on Hong Kong. Before the security bill was withdrawn in its entirety in September of 2003, the authorities deleted this provision in an attempt to respond to criticism of the bill and to obtain greater public support for it. It is interesting to note that Hong Kong's *United Nations (Anti-Terrorism Measures) Ordinance* enacted in 2002 was much less controversial even though it provided a similar mechanism for Hong Kong officials to proscribe organizations and persons listed as terrorists by the United Nations Security Council. The potential for proscription decisions to be made on the mainland was much more controversial in Hong Kong than the potential for similar listing decisions to be made by the U.N. Security Council.

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[59] *Secretary of State for the Home Department v. Rehman* [2001] 3 WLR 877 (H.L.)

[60] See for example David Dyzenhaus "The Permanence of the Temporary: Can Emergency Powers be Normalized?" in Daniels, Macklem and Roach eds *The Security of Freedom* (Toronto: University of Toronto Press, 2001).

Another notable feature of the proscription mechanism in Hong Kong's security bill was that it provided far more procedural protections than are available under the United Kingdom's *Terrorism Act, 2000* or the many laws influenced by the British example. The security bill provided that before an organization was proscribed, it must, unless it is not reasonably practicable, be given an opportunity to be heard or make written representations to the decision-maker. In contrast, the British and Canadian legislation only provides for a limited form of judicial review after the listing decision and no hearing requirements before the momentous decision to officially designate a group as an illegal terrorist group. The before the fact procedural rights in the proposed security law may in part be related to the fact that state regulation of associational life through the *Societies Ordinance* is more regularized in Hong Kong than in western democracies. Nevertheless, it is significant that the government did not attempt to detract from such procedural rights when providing for the proscription of organizations on the basis that they were a security risk.

There were also provisions in the security bill providing for after the fact judicial review of the proscription decision. There was criticism that some provisions would have allowed regulations to made with respect to the security of information disclosed in such proceedings. These provisions included the exclusion of the person challenging the proscription decision. Such departures from the adjudicative ideal are, however, common in the national security context in western nations. Hong Kong's proposed security bill was in some respects more liberal than the comparable Canadian law because it contemplated that the applicant would receive a summary of the evidence heard in his or her absence and required that the reviewing court be given the power to appoint a lawyer to act in the interest of the person challenging the proscription decision. In contrast, the comparable Canadian law makes no provision for the appointment of an amicus to ensure an adversarial hearing and it contemplates that judges could uphold the listing in the absence of adversarial argument or the disclosure of even a summary of the government's evidence to the listed group or organization. An experienced judge of the court that reviews listing and other security decisions in Canada has publicly complained that the procedure is not fair and makes him feel like a "fig leaf"[61], but the Supreme Court of Canada has recently upheld ex

[61] James Hugessen "Watching the Watchers: Democratic Oversight" in David Daubney et al *Terrorism, Law and Democracy How is Canada Changing After September 11?* (Montreal: Yvon Blais, 2002) at 384-6.

parte hearings in part because of a concern that the United States, the United Kingdom and France may not share intelligence with Canada unless they receive guarantees that the intelligence will remain confidential.[62] The new security imperative is placing pressure on many western nations to use confidential and sensitive intelligence to proscribe groups, while keeping this information secret not only from the public but the person being labeled a security threat.

It should dispel any illusions about so-called Asian values when Hong Kong can provide more procedural protections for those it proposed to list as security threats than a western democracy such as Canada. It is even more significant that the people of Hong Kong were able to stop the enactment of the security bill through their massive protests whereas the Canadian law was rushed through Parliament with closure being invoked to cut off debate. Similar stories could be told about the enactment of the American *Patriot Act* and the British *Terrorism Act, 2001* in the months following the September 11 terrorist attacks.[63] Western democracies have been more inclined to panic and impose restrictions on both associational life and the adjudicative ideal than Indonesia and Hong Kong, places that are at best struggling for democracy while facing security threats that are at least as serious as those faced by western democracies. The comparative track record on these issues not only should dispel simplistic stereotypes about authoritarian Asian values and liberal western values, but also suggest that some of the more inspiring defences of democratic ideals since September 11 may have come from the east and not the west.

IV. Retroactive Laws and Legislating After Acts of Terrorism

There are dangers, however, of romanticizing the Hong Kong and Indonesian experience. Hong Kong and Indonesia may be exceptional in Asia given the draconian security apparatus found in other countries in the region, notably Singapore and Malaysia. The Indonesian record is also mixed. The anti-terrorism law enacted in the wake of the Bali bombing was declared as an emergency regulation by the President and not enacted as legislation. In addition, it was accompanied by a second emergency regulation that gave the first emergency regulation retroactive effect. The preamble to this second regulation explained that :

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[62] *Ruby v. Canada* 2002 SCC 75

[63] See Philip Thomas "September 11 and Good Governance" (2002) 53 Northern Ireland L.Q. 366.

> whereas the bombing incident that occurred in Bali on October 12, 2002, has caused a situation of terror or widespread fear on people and has claimed lives and properties of other people

Retroactive criminal offences are in tension with most human rights norms including those in the Universal Declaration of Human Rights which was included as a bill of rights in Indonesia's constitution in 2002. Article 281(1) of that Constitution provides that "the right not to be prosecuted on the basis of a retroactive law" is recognized and "cannot be diminished in any circumstances."

The origins of this right in the Indonesian constitution is a matter of some controversy. Some argue that it was included by oversight while others argue that the military wanted the right included as a restraint on retroactive prosecution of military atrocities under the Soeharto regime. In any event, the provision was criticized by both Amnesty International and the Indonesian Legal Aid and Human Rights Association as an obstacle to the prosecution of human rights abuses.[64] The fact that organizations with such impeccable credentials would oppose a traditional right that is almost universally recognized in most rights protections documents is of no small significance. It suggests that the current emphasis on the rights of victims and accountability for crimes has significantly tempered an older due process vision that restrained the state in its efforts to prosecute even the factually guilty. It represents a transformation in criminal justice based on claims that the criminal sanction is now supported by the rights of crime victims.[65]

Any assessment of the problems of militant democracy should make account for the fact that rights claims made by the accused today are more likely to be countered by claims on behalf of the victims of crime or groups of potential victims of crime. There are many dangers and distortions when victims' rights are used to match or trump the rights of the accused. One is that the inherent significance of state coercion may be discounted. Another is that a simplistic assumption is made that a criminal prosecution adequately protects potential victims and responds to the needs and rights of actual victims. For example post

[64] Ross Clarke "Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials" supra at 131-135.

[65] See for example George Fletcher *With Justice for Some: Victims' Rights in Criminal Trials* (Reading: Addison- Wesley, 1995) and my "Four Models of the Criminal Process" (1999) 89 J. Crim L and Criminology 671.

September 11 anti-terrorism laws in both the United Kingdom [66]and Canada created new hate crimes to protect religious groups from crime, but did not take steps to prevent state agents from engaging in discriminatory profiling. Militant democracies will often be happy to create more crimes and punish them more severely, but much more reluctant to restrain the state. The crimes of September 11 have probably increased a process that has been described as "governing through crime"[67] or the "criminalization of politics"[68]. One of the characteristics of militant democracy is that it will make extravagant and frequently false claims about the benefits of the criminal sanction and that it will conceive of terrorism through the lens of criminal as opposed to political or social justice. The emphasis on the criminal sanction may also blind policy-makers to the alternatives of administrative regulation and harm reduction strategies that may be more effective than the criminal sanction in limiting the harms of both terrorism and a wide variety of natural and man-made disasters.[69]

The above critique however does not provide an answer to the dilemmas of whether Indonesia should have given its new anti-terrorism law retroactive effect. There are many weaknesses in the Indonesian Penal Code which was inherited from the Dutch. For example, it has a weak provision respecting attempts which require a person to have started the criminal act before being guilty and does not have general provision that would allow the prosecution of conspiracies to commit crimes such as murder and bombing. There is also ambiguity about whether limits on the right against retroactive crimes can be justified under the Indonesian constitution. Most modern bills of rights allow rights to be limited in a proportionate manner for important objectives. Modern bills of rights also generally allow rights to be overridden or derogated from in extraordinary circumstances including times of emergency.

The issue of retrospective norms is of particular concern to transitional societies. The injustice of the past regime may often mean that the laws of the past will not be adequate to deal with the wrongdoing of the past. Nevertheless, it is often extremely

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[66] *Anti-Terrorism, Crime and Security Act, 2001* c.24 Part V.

[67] Jonthan Simon "Governing Through Crime" in Friedman and Fisher eds *The Crime Conundrum* (New York: Westview Press, 1997)

[68] See my "Four Models of the Criminal Process" supra

important for a transitional society to have some degree of accountability for the past, and the threat of criminal prosecutions, even if ultimately foregone in favour of an amnesty or some form of restorative justice, may be an important vehicle for accountability. In Indonesia, both military officials on trial for human rights atrocities in East Timor and those charged with acts of terrorism in relation to the Bali bombing have argued, so far without success, that the laws violate the right against retroactive crimes in the Indonesian constitution. Commentators are generally sympathetic to the idea that Indonesia should be able to prosecute both offences in a retroactive fashion. They argue that crimes against humanity are a recognized exception to the rule against retroactivity and that successful prosecutions can help create a culture of accountability in Indonesia. At the same time, they recognize that not charging the Bali bombings with any non-retroactive offence under the existing Penal Code was "a high-risk strategy" that could possibly result in acquittals on appeals. [70]

The argument in favour of retroactive crimes indicates how unfashionable claims of absolute rights are today, particularly when they are made by those accused of crimes who have harmed or killed sympathetic and innocent victims. The willingness to condone retroactive crimes also demonstrates a tendency in militant democracy to use criminal laws as a direct response to terrible crimes of terrorism. To be sure, Indonesia has pushed retroactivity to and perhaps beyond constitutional limits by making its new terrorism offences retroactive. Nevertheless, the retroactive nature of the Indonesian anti-terrorism law is more a difference of degree than of kind with the retroactivity found in the anti-terrorism laws of many western democracies. In the United Kingdom, a 1974 anti-terrorism law was quickly enacted with only 17 hours of debate after IRA bombings in a Birmingham pub killed 21 people and injured another 180 people.[71] Similarly new terrorism laws in both the United Kingdom and Ireland were enacted in the days following the Omagh bombings in 1998.[72] To be sure, the offences in that law were not made retroactive, but the law was made in a spirit of retrospective law-making. In the United States, a 1996 anti-terrorism law

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[69] For a broader human security approach to prevent and limits the harms of modern terrorism, as well as other disasters, involving public health and the safety of food and water supplies see my *September 11: Consequence for Canada* supra ch.7.

[70] Ibid at 145-149.

[71] *Prevention of Terrorism (Temporary Provisions) Act, 1974.* See Philip Thomas "Emergency Terrorist Legislation" (1998) Journal of Civil Liberties 240.

was enacted in response to the bombing of a federal building in Oklahoma City and an earlier bombing of the World Trade Centre.[73] Similarly there was a wave of new anti-terrorism laws enacted throughout the world in response to the September 11 terrorist attacks. In this light, the emergency and retroactive Indonesian anti-terrorism regulation enacted after the Bali bombings fit into a pattern of democracies responding to acts of terrorism with powerful new anti-terrorism laws. To be sure most western laws do not go as far as the Indonesian law in creating retroactive crimes.[74] Nevertheless, they do represent a hyper contextual, emotional and sometimes disproportionate response to particular crimes. Western democracies, caught up in the panicked catch up game of enacting new laws after terrible acts of terrorism, may observe the formal requirement of rights against retroactive laws, but not the spirit of such protections.

Laws enacted in the immediate aftermath of terrible acts of terrorism are often based on the implicit or explicit assumption that new laws in themselves could prevent such acts. Such assumptions are in most cases totally unwarranted. If the authorities had known about IRA bombings, the Oklahoma City bombings or the September 11 attacks, they would not have sat by awaiting legislative reforms. Existing laws concerning conspiracies and attempts in many western democracies are often strong enough to apply to apprehended acts of terrorism. The passage of laws in response to great tragedies suggest that we have a collective control over tragedy that we unfortunately do not have. The European Court of Human Rights fell into this trap when it seemed to suggest in the Turkish welfare party case that a law prohibiting the Nazi party and other parties opposed to democracy might have prevented the horrors of World War II and the Holocaust.[75] The horror of the harm is then used as a justification for taking preventive steps, even at the acknowledged "risk of intervening prematurely and before the danger concerned has taken shape and become real."

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[72] Philip Thomas "September 11 and Good Governance" (2002) 53 Northern Ireland L.Q. 366 at 369.
[73] Laurie McQuade "Tragedy as a Catalyst for Reform: The American Way?" (1996) 11 Conn. J of Int. Law 325.
[74] The offences may not be retroactive, but one Canadian court has held that a new investigative power in the 2001 Anti-terrorism act can be applied to the investigation of the 1985 terrorist bombing of an Air India aircraft.
[75] The Court indicated that it "considers it not at all improbable that totalitarian movements, organized in the form of political parties, might do way with democracy, after prospering under the democratic regime, there being examples of this in modern European history." *Refah Partisi and Others v. Turkey* supra at para 99.

[76] The horrors of the past are invoked in militant democracy as the justification for not waiting until the new danger has become "clear and present."

Speaking in 1988, Justice William Brennan argued that the reactive nature of democratic law-making in the face of perceived security crises was a source of both pride and shame. The pride for Brennan came from his confidence that "after each perceived security crisis ended, the United States remorselessly realized that the abrogation of civil liberties was unnecessary". The shame was that this remorse was not strong enough "to prevent itself from repeating the error when the next crisis came along."[77] The idea of militant democracy turns this cycle on its head. It means that a democracy can infringe civil liberties without ever having to say that it is sorry. Indeed the only cause for regret may be that the democracy waited too long to enact the anti-terrorism measure. Such a celebration of militant democracy is dangerous not only because it devalues civil liberties but because it makes false and extravagant presumptions about the ability of harsh criminal laws to stop terrorism. If the new laws fail to prevent new acts of terrorism, democracies can be caught in a trap [78]of enacting increasingly repressive laws as its response to successive acts of terrorism.

V. Preventive Detention

The answer to the vulnerability of open societies to terrorism for some is preventive detention. Preventive detention is the practice of incarcerating people not on the basis that they have committed some crime- including attempts or conspiracies to commit crimes- but on the basis that they have been deemed to be a risk to commit a crime in the future. The exact details of preventive detention may differ from place to place. In countries such as the United Kingdom or Canada, the judiciary is often brought in quite early and has an important role in deciding whether preventive detention is justified. In other regimes, such as the internal security laws of Singapore and Malaysia, it is the executive that plays the most important role in deeming a person a security risk that should be detained. Preventive detention can be seen not only as an instrument of militant democracy, but also as a

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[76] Ibid at para 110.

[77] William Brennan "The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises" (1988) 18 Israel Y.B. H.R. 11 at 11.

[78] For an argument that terrorism sets a terror trap of governmental overreaction see Gwynne Dyer "Terrorism, Law and Democracy" in David Daubney et al *Terrorism, Law and Democracy* 2002 at 67.

technology of risk societies[79] that are perhaps better at calculating risks than controlling them.

As Michael Hor has observed "while the rest of the liberal democratic world scrambled to enact massive terrorism legislation in the aftermath of September, Singapore had only to perform a relative minor tweaking of its laws" because of its reliance on its Internal Security Act which exists as a kind of "super-criminal law, swooping down and dealing with those suspected of criminal activity when the Executive perceives that the normal processes of criminal law are likely to fail or create more problems than they solve."[80] In one of its responses to the Anti-Terrorism Committee established by the United Nations Security Council, Singapore defended its ISA with reference to its use against Jemaah Islamiyah. It argued: "Singapore believes that swift and decisive steps must be taken to prevent persons from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including recruitment to terrorist groups". It defended the ISA as a means to detain terrorist "in circumstances where it is not practical to deal with threats posed by terrorists under the normal parameters of criminal law." One advantage of the ISA was that it prevented the disclosure of information in evidence in open court that would threaten sources of information and covert investigative techniques. Singapore also defended the ISA on the basis that its detention power "is strictly governed by law." The original period of detention to facilitate investigate was limited to 30 days. "If the person concerned is found to be not involved in the alleged activities, he will, of course, be released unconditionally." Detentions orders are only made "if he person is found to be deeply involved in the alleged activities" and are limited to 2 years.[81] Within 90 days of the order, an ISA Advisory Board, chaired by a sitting Supreme Court judge, will hear representations from the detainee and make representations to the President who has the final authority to decide whether to detain or release the person. As Hor has observed, even under Singaporean law, there is "a semblance of due process"[82] in the administration of preventive detention.

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[79] Ulrich Beck *Risk Society: Toward a New Modernity* (London: Sage, 1992).
[80] Michael Hor "Terrorism and the Criminal Law: Singapore's Solution" [2002] Sing JLS 30 at 31,43
[81] Singapore's Response to Questions 17 June 2002 S/2002/690
[82] Michael Hor "Terrorism and the Criminal Law: Singapore's Solution" [2002] Sing JLS 30 at 43

Before September 11, there was some momentum in Malaysia to reform its internal security act, an act that had been used to detain thousands of people, including political opponents of the government. Interestingly enough for those who would seek to explain internal security acts as an expression of authoritarian or communitarian Asian values, they were inherited in both Singapore and Malaysia, as well as in Israel, from British colonial rule. In any event, there was some indigenous support in both Singapore and Malaysia for reform of the ISA's before September 11. For example, one Malaysian lawyer argued in July 2001 that "one can see a momentum building in the public's sphere of society, saying that this law is archaic, anachronistic and is being abused". A judge had even called for Parliament to review the law.[83] After September 11, however, the internal security law was re-invigorated and as in Singapore was used to detain members of the JI and other Muslim militants. Malaysia's report to the UN Security council pursuant to resolution 1373 gave pride of place to the ISA which was described as "utilized to detain persons with a view to preventing them from acting in any manner prejudicial to Malaysia's national security, maintenance of essential services or the economic life of Malaysia". In response to the focus on financing terrorism, Malaysia responded that the act does not directly address such acts "but it does enable action to be taken against such activities." The report also anticipated that the gains of economic liberalization and globalization could be threatened if it was not seen as supporting the war against terrorism. It observed that "the economic life of Malaysia may be prejudiced" should its failure to fight terrorism result in "economic sanctions imposed against it, whether by UN, US or by Malaysia's trading partners."[84] In this way, the demands of economic liberalism were presented as counter to the demands of political liberalism, in the form of the demand for reform of the ISA before September 11.

It is unlikely that the ISA in either Singapore or Malaysia will be abolished or reformed in the immediate future. Preventive detention has been legitimized by the perceived need to respond to committed cells of terrorists prepared to die for their cause and in both countries has been defended in the name of keeping goods and services flowing. The secret nature of administrative hearings under the ISA has also been defended as an effective means for authorities to keep intelligence and intelligence sources secret. In western

[83] as quoted in Therese Lee "Malaysia and the Internal Security Act: The Insecurity of Human Rights Act After September 11" [2002] Sing.J.L.S. 56 at 61.

democracies, the closing of courts or the keeping of evidence from the accused, although possible, is much more problematic.

Even if a judge or some politician in Singapore or Malaysia became committed to reform of the ISA, it is an open question whether such reform would stick. In the late 1980's, courts in both countries[85] departed from extreme deference to executive determination of threats to security that followed the majority decision of the House of Lords in *Liversidge v. Anderson* .[86] In that case, the majority held that the subjective views of the executive and no reasons were required to satisfy a statutory requirement that the Home Secretary had "reasonable cause to believe" that a person should be detained during World II as a security risk. This led Lord Atkin to issue his justifiably famous dissent that "in this country, amid the clash of arms, the laws are not silent. …It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting that the judges..stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law."[87] When judges in Singapore and Malaysia asserted in the late 1980's that they could review whether there was an objective basis for detention under the ISA, the reaction from the respective governments was swift and strong. In both countries, both the constitution and the ISA were amended to make clear that the subjective perceptions of the executive of a security threat were sufficient to justify detention under the ISA. The governments in both countries were prepared to state clearly both in the ISA and in their own constitutions that the courts could only rule on matters of procedural regularity with respect to the ISA. The lesson of these developments seems to be that the courts cannot get ahead of the government in their concern for freedom and liberty and that judicial decisions are vulnerable to reversal. Indeed, the cause of more vigourous judicial review of preventive detention may have been permanently set back because the authorities in both countries concluded that it was necessary to amend not only the ISA, but the constitution to reverse the decisions of the courts. There was no illusion that the government was temporarily derogating from rights in an emergency.

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[84] Letter 4 Jan, 2002 from Z Yahya to Chaur of Counter-Terrorism Committee S/ 2002/ 35
[85] ibid at 65-66 for cites to the Malaysian cases. The main case in Singapore was *Chng Suan Tze v. Minister of Home Affairs* [1988] Sing.L.R, 132
[86] [1942] AC 206

Indonesia resisted demands to move back to Soeharto-style security laws that would allow preventive detention after September 11. The original draft of its anti-terrorism law provided for an arrest of 7 days "against any person allegedly based on the adequate initial evidence of the commission of a criminal act of terrorism."[88] This reflected the influence of a 7 day preventive arrest provision found in the British *Terrorism Act, 2000*. The new British provision for preventive detention has, unlike previous ones, been enacted without a formal derogation from the *European Convention* on the basis that such an override of rights is not necessary because of the requirement under the British law that the judiciary decide whether detention is required after the first 48 hours. On the one hand, judicial review can be an important safeguard and judges may be expected to order the release of some people held in preventive detention. On the other hand, the idea that preventive detention is consistent with rights protection sits uneasily with liberal values that limit the state's response to crime. The central place of judicial authorization of preventive detention lends some support to those who argue that due process safeguards can enable and legitimate the expansion of the state's crime control activities. Recent proposals call for the 7 day period under the British law to be extended to a maximum 14 day period, but again without the need for any formal derogation from rights.[89]

In subsequent drafts of the Indonesian anti-terrorism law, the preventive arrest provision was changed to allow arrests of those "strongly suspected of having committed a criminal act of terrorism" with some drafts limiting the period of preventive arrest to the 3 days allowed under Canada's *Anti-terrorism Act*. The Indonesian provisions were more restrictive than the Canadian provisions which allow a judge to require a person who is subject to preventive arrest to enter into a peace bond and agree not to undertake certain proscribed activities. A refusal to agree to such conditions under the Canadian law is an offence that can be subject by up to a year in imprisonment and disobeying one of the conditions can result in up to 2 years imprisonment.[90] Thus, the Canadian law allowed for longer term controls over terrorist suspects subject to preventive arrest than the Indonesian law.

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[87] ibid at 244
[88] First Draft Art. 17.
[89] *Terrorism Act, 2000* c.11 s.41 and Schedule 8.
[90] Criminal Code of Canada s.83.3

After the Bali bombings, the Indonesian period of preventive arrest was increased back to 7 days, but may have been displaced by the addition of another provision providing that "for the purpose of investigation and prosecution, the investigator concerned shall be granted the authority to hold suspects in detention for not more than 6 months."[91] This provision raised civil liberties concerns. Tim Lindsey has observed that it "constitutes the grant of broad new powers to the state that reformers feared, although it should be noted that under the existing Code of Criminal Procedure (Kuhap) it was already possible to detain suspects for up to 90 days, with judicial approval."[92] The use of longer period of detention for investigation and prosecution show the limits of transplanting notions of short periods of preventive arrest from western law into the Indonesian context. The 6 month period was modified when an anti-terrorism law was enacted to provide that 4 of the 6 months could be for investigation and 2 for prosecution and that extensions could be granted "through notifications to the Head of the District Court."[93] The extensive period of four months of investigative detention is now authorized under Indonesian anti-terrorism law and it can be extended by judicial order. The presence of such a power may help explain why Indonesia even after the Marriott bombing has not yet moved towards adopting a ISA type law, as demanded by some.

Although the Indonesian regulations and laws declared a general principle that the ordinary legal rules should be used for the investigation and prosecution of terrorism offences, important exceptions were made in the anti-terrorism law. The most criticized were provisions in both the regulation and the law which allowed intelligence reports to be used and the adequacy of the preliminary evidence to be determined in a closed hearing. Lindsey has commented that the authorized use of intelligence reports "is perhaps the most unusual and the most worrying from a civil rights point of view. Clearly the notion that contrived intelligence reports could result in a conviction regardless of the material they are based on opens huge opportunities for exploitation by unscrupulous police. This is particularly of concern given the unimpressive record of Indonesian intelligence to date." [94] The final law only partially responded to these concerns by requiring that the intelligence

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[91] Perpu Article 25(2)
[92] Tim Lindsey "Indonesia's New Anti-Terrorism Law: Damned if you Do, Damned if you Don't" July 28, 2000 www.law.unimelb.edu.au/alc/wip/anti-terrorism.html.
[93] Law art 25(4).

reports be "authenticated by the Head of the Intelligence Agency."[95] The regulation and the law did, however, depart from the withdrawn draft by deleting a provision that provided that a suspect at the investigative level "shall not have the right to be accompanied by the advocates; to remain silent or refusing to answer the examiner's question or…to contact with outsiders including the family members."[96] As criticisms of the west for not respecting civil liberties in the wake of September 11 increased and in response to criticisms within Indonesian society of the authoritarian nature of the withdrawn draft, the Indonesian authorities became less willing expressly to derogate from the rights of terrorist suspects even though they were prepared to authorize extensive periods of investigative detention.

In the aftermath of September 11, western democracies responded in a manner that undermines both their critiques of the ISA and the claim that the priority given to security over liberty is a uniquely Asian phenomena. Indeed, the most authoritarian western responses were not the enactment or extension of preventive arrest provisions criminal laws prohibiting terrorism, but the use of existing or new immigration laws to authorize long term detention of suspected terrorists. The focus on immigration is significant for a variety of reasons. Immigration law is less visible and subject to civil libertarian criticism than the criminal law. Indeed, western democracies have long accepted incursions on adjudicative fairness in immigration law that would be intensely controversial if applied to their citizens under the domestic criminal law.[97] Another factor is that immigration law is a site where the detainee or deportee is constructed as the other and where claims of national security, sovereignty and solidarity are most easily made. Finally, immigration law is the type of law that those in the developing world are most likely to encounter in their dealings with the west. Immigration law for mundane matters such as obtaining a visa to more extreme matters such as detention and deportation is much more likely to act as a teacher about what the west is all about than the criminal law reforms that are much more extensively debated in the newspapers and the academic journals.

In the aftermath of September 11, it soon became apparent that immigration law as opposed to the more high profile new criminal laws would be applied to those suspected of

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[94] Tim Lindsey "Indonesia's New Anti-Terrorism Law"
[95] Final Law Art 26(1)
[96] Withdrawn Draft Article 19.

involvement with terrorism. On October 25, 2001, United States Attorney General John Ashcroft declared: "Let the terrorists among us be warned. If you overstay your visa even by one day- we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security from terrorism."[98] Ashcroft's statements were also backed up by provisions in the Patriot Act headed as "mandatory detention of suspected terrorists". They allowed the Attorney General to certify and detain aliens for 6 month periods on the basis that their release "will threaten the national security of the United States or the safety of the community or any other person" subject to only limited habeas corpus review.[99] There are still some differences between immigration detention in the United States and detention under the Asian ISA's, but it is not nearly as great as might be imagined by the stereotyped contrast between Asian authoritarianism and western individualism.

Attorney General Ashcroft made good on his promise to use immigration laws to full advantage after September 11. Reports of immigration detentions in the aftermath of September 11 soon listed the number at about 1200, before officials in the Department of Justice stopped counting. A subsequent report by the Inspector General of the United States Department of Justice focused on 762 people held by the Immigration and Naturalization Service in connection with September 11. The Inspector General found that a blanket policy of holding these people until cleared by the FBI was implemented and resulted in an average detention of 80 days. In 18 cases, the detention exceeded 180 days, or the six months allowed under the ISA.[100] On Sept 20, 2001 a policy was implemented that would allow the detainees only one legal call a week and one social call a month.[101] The conditions of confinement were harsh and involved lights being left on 24 hours a day. Although denied by almost all officials and declined for prosecution, the Inspector General also found evidence of a "pattern of physical and verbal abuse" against the detainees in one Brooklyn

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[97] See Audrey Macklin "Borderline Security" in Daniels, Macklem and Roach eds *The Security of Freedom* (Toronto: University of Toronto Press, 2001).
[98] Inspector General, Department of Justice Report 2003 at p.12
[99] *Patriot Act* s.412
[100] Inspector General, Department of Justice Report 2003 at 51
[101] ibid at 124

Detention Centre (MDC).[102] The vast majority of the detainees "were held on alleged violations of their immigration status, such as overstaying a tourist visa…Most of the detainees were eventually released, There are no indications that anyone caught in the autumn 2001 roundups was ever linked to the September 11 attacks or was found to possess any knowledge of them."[103]

The American use of preventive detention was especially anomalous because its criminal law, unlike British or Canadian law, did not authorize preventive arrests. Preventive detention in the United States was authorized in the formal immigration law and practiced through the use material witness warrants and the designation of terrorist suspects as enemy combatants, as well as the apparently lawless detention of over 600 people at Guantanamo Bay. [104] The United States immigration system also targeted people from Arab and Muslim countries for registration including fingerprinting. This is unfortunate because before September 11, both American political parties had agreed to enact legislation to prohibit and monitor racial profiling in which people were subject to investigation because of their race.[105] The most repressive measures in the United States have proceeded at the edges of the law and have not been entrenched in the criminal law, as they have been in the United Kingdom and Canada.[106]

The United Kingdom also amended its immigration law in the wake of September 11. It allows the Secretary for State to issue a certificate on the basis of reasonable suspicion that a person has links with an international terrorist groups in the sense of supporting or assisting the group and is a risk to national security. The law provides for indeterminate

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[102] ibid at 197

[103] Roberto Suro "Who are "we' Now? Collateral Damage to Immigration" in R. Leone and G. Anrig Jr.*The War on Our Freedoms Civil Liberties in an Age of Terrorism* (New York: Public Affairs, 2003) at 157.

[104] For my arguments that the detention and interrogation of these people violates the Geneva Convention and that Canadian soldiers who delivered captives in Afghanistan to the American forces were complicit in such violations see "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism" (2002) 47 McGill L.J. 893 at 935-939.

[105] S. Gross and D. Livingston "Racial Profiling under Attack" (2002) 102 Colum.L.Rev. 1413. Calls to prohibit racial or religious profiling in Canada's anti-terrorism law or even to add a weaker non-discrimination clause were rejected. Instead the government created a new hate crime to protect religious buildings and made it easier to dilute hate propaganda from the internet.

[106] But for a disturbing call by Alan Dershowitz that the United States amend its formal law to allow the torture of suspected terrorists in emergency circumstances see Alan Dershowitz *Why Terrorism Works* (New Haven: Yale University Press, 2002) ch.4. For an interesting defence of an extra-legal approach (but not necessarily the American approach post-September 11) see Oren Gross "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional" (2003) 112 Yale L.J. 1011. One of Gross's points is that an extra-legal approach runs less risk of infecting the formal law with powers designed to deal with emergencies.

detention of a person so certified who cannot be deported because of concerns that he will be tortured in his or her country of origin. In order to authorize such detention, the United Kingdom entered a temporary derogation from fair trial rights under the European Convention. The result is an indication of how far a democracy is prepared to go to protect itself from international terrorist. At the same time, it is significant that the derogation is temporary, although renewable, and was made with explicit legislative authorization and provision for legislative review.[107] In the United States, the option of emergency derogation from rights is not present even though such an approach may help preserve rights at least in a non-emergency situation. The British approach of an explicit legislative derogation may also preserve rights better than the Canadian approach which counsels both heightened judicial deference to an executive determination that a person does not face a risk of torture and also holds out the possibility that in some un-defined extraordinary circumstances, deportation to face torture will be held by the courts not to violate the Canadian Charter of Rights and Freedoms.[108]

Canada has its own experience of preventive detention under its immigration law. In August, 2003, 21 non citizens from Pakistan were arrested and detained under the Immigration and Refugee Protection Act. In many ways they were arrested for typical immigration act violations relating to misleading statements and a fraudulent school being used as a means to obtain student visas. Nevertheless, the arrests were headline news in Canada in large because of a sensational "backgrounder" prepared by a Public Service and Anti-Terrorism Unit, composed of Mounties and immigration officials. It stressed that the group were young men: "from, or have connections to, the Punjab province in Pakistan that is noted for Sunni extremism…They appear to reside in clusters of 4 or 5 young males and appear to change residences in clusters and/or interchange addresses with other clusters…All targets were in Canada prior to September 5, 2001….A confirmed associate of the group…provided an offer of employment from Global Relief Foundation…[which] has been identified by the United Nations as a fundraising group that provides financial support to terrorist groups, including Al Qaeda…One of the targeted apartments is reported to have

[107] *Anti-terrorism, Crime and Security Act, 2001* c.24 Part IV.
[108] *Suresh v. Canada* 2002 SCC 1; *Ahani v. Canada* 2002 SCC 2. In the later case, the courts deferred to the executive's determination that a man would not be tortured if sent back to Iran and the man was deported

aeroplane schematics posted on the wall, as well as pictures of guns." And then the allegation that was the lead in the newspapers: "One of the subjects is currently enrolled in flight school to qualify as a multi-engine commercial pilot. His flight path for training purposes flies over the Pickering Nuclear Plant."[109] Not surprisingly given the dramatic nature of this extraordinary press release, the initial detention of 19 men (the same number involved in the September 11 attacks) was highly publicized and initially raised many security concerns in Canada. The men were arrested and detained on the basis that an immigration officer "has reasonable grounds to believe" that they were inadmissible and a danger to the public. [110] They were entitled to prompt administrative hearings, but most of the men were detained on the grounds that "the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human and international rights".[111] For its part the investigation which included an examination of van loads of documents and computer files was estimated to take many weeks. This provision was even more facilitative of preventive detention than the procedure usually used to deal with apprehended terrorists which involve the Minister signing a certificate declaring a person a security threat with its reasonableness then being determined before a court, albeit with steps taken to preserve the confidentiality of intelligence sources not only from the public, but also from the person deemed to be a threat.[112]

The aftermath of these detentions suggest that the front page news about a suspected Al Qaeda cell with designs on a nuclear plant was most likely grossly unfair. Many of the men have been released after adjudicators determined that they were not a present threat. Those who have been deported have been deported not on security grounds but because of visa violations. Ten of the men are making refugee applications on the basis that the publicity surrounding the case has made them liable to detention under Pakistan's harsh anti-terrorism laws.[113] The whole incident has started to look more like a case of common place immigration violations than a disruption of an apocalyptic terrorist scheme. It has caused widespread resentment among Canada's Muslim and Arab communities with some

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despite a subsequent legal challenge designed to keep him in Canada until the United Nation's Human Rights Committee considered the matter. See *Ahani v. Canada* (2002) 59 O.R.(3d) 107 (C.A.).

[109] Project Thread Backgrounder: Reasons for Detention Pursuant to 58(1)(c) undated

[110] *Immigration and Refugee Protection Act.* S.C. 2001 c. 27, s.55

[111] ibid s.58(1) (C)

[112] ibid s.77-8

criticizing the apprehension of the men as the actions of a police state and others suggesting that it is an example of profiling that victimizes the innocent. At the same time, there is little demand in western democracies for more liberal immigration laws. The fact that detention on the basis of suspicion in American and Canadian immigration law was accepted as normal even before September 11 suggests that there will likely not be any reconsideration of this state of affairs in the foreseeable future. The formal derogation from fair trial rights in the British law, however, means that the issue of how suspected terrorists are treated under immigration law will not go away and will be debated and assessed against the background of whether it is necessary to derogate from fair trial rights.

September 11 has revealed immigration laws as the site through which western democracies are mostly likely to practice preventive detention. It may be too extravagant to conclude that immigration laws are the western equivalent of Asian ISA's, but there is some truth in such a statement. The fact that citizens from Asia and elsewhere are most likely to experience western justice through immigration laws also suggests that those concerned with the spread of democracy should pay more attention to western immigration laws. Western immigration laws and the new security imperative, including the threat that those countries who are not hard on potential terrorists, may suffer economically may help to re-legitimize preventive detention as practiced in countries such as Singapore and Malaysia. At the same time, there are important exceptions and complications to the idea that September 11 will inevitably produce a convergence between eastern and western approaches to security. Even after the Marriott bombing, Indonesia has so far resisted calls to adopt its own ISA.

Conclusion

Although the new security imperative has stalled attempts to reform Internal Security Laws in Singapore and Malaysia, the experience to date should displace crude and stereotyped contrasts between Asian authoritarianism and western liberal individualism. There are both authoritarian and liberal strains in most societies and there is even some evidence that countries such as Indonesia and Hong Kong that are struggling for democracy may be more acutely aware of the dilemmas of militant democracy. Unable to rest on their democratic credentials, or the fact that their most repressive laws are directed against non-

[113] "Detained students seek refugee status" *Toronto Star* 11 Oct. 2003.

citizens, these countries seem to have be more aware since September 11 that a democracy that takes all measures to protect itself risk abandoning some of the democratic character that it is fighting to preserve.

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Old and New Visions of Security: Article 23 Compared to Post-September 11 Security Laws

Revised 6 October 2003

Kent Roach*

Hong Kong was committed by Article 23 of its Basic Law to enact national security laws long before September 11, 2001. The terrorist attacks on the United States did not figure prominently in attempts to defend and justify the *National Security (Legislative Provisions) Bill* before it was withdrawn. The national security bill highlighted crimes of treason, secession, sedition and subversion against the state rather than new crimes of terrorism that have been enacted in many countries, including Hong Kong[1], as a direct response to September 11. Appearances and labels, however, may be deceiving. In this chapter, I will argue that the security bill combined an older vision of security based on betrayal of the state with a newer vision of security found in the post-September 11 anti-terrorism laws of many countries. The new vision of security was concerned not so much with betrayal of the state but with modern, global and cell-based terrorism that targets civilians, electronic systems, public health, and essential services. It was found not so much on the face of the new offences in the bill, but rather in their details, especially the overbroad definition of "serious criminal means".[2] The new vision of security was inspired by the United Kingdom's *Terrorism Act, 2000* [3] and the post-September 11 anti-terrorism laws that have been modeled on that influential law in Canada, Australia and Hong Kong, but without the safeguards for protests and strikes provided in those laws.

My argument that the security bill combined old and new visions of security is not simply a matter of historical or sociological significance. The pursuit of both forms of security aggravated the dangers to civil society that would be present from the pursuit of only one of the visions of security. The bill would have given the state potent powers to

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[1] *United Nations (Anti-Terrorism Measures) Ordinance* c.575. See generally Simon Young "Hong Kong's Anti-terrorism Measures Under Fire" Occasional Paper no. 7, Jan. 2003. Additional legislation relating to terrorism is also planned in Hong Kong.

[2] *National Security (Legislative Provisions) Bill* s. 4

[3] c.11.

enforce laws based on betrayal, subversion and splitting the state that take inspiration from the Criminal Code of the People's Republic of China, as well as the wording of Article 23 itself. In itself, this would have been more than enough cause for concern.

At the same time, however, the bill also would have allowed the state to pursue a newer vision of security that targets a broad array of serious criminal means that endanger public health and safety, private property, electronic systems and essential public or private services, facilities and systems. There are serious concerns that new anti-terrorism laws enacted after September 11, 2001 are overbroad and may erode fundamental freedoms and the role of the independent judiciary. If enacted, the security bill would have given Hong Kong a double dose of security, the old security inspired by the People's Republic of China and the wording of Article 23 and the new security inspired by the United Kingdom and the definition of serious criminal means in the security. Both the old and the new dose of security in the bill would be troubling by themselves. A double dose of security might have been too much for the continued viability of civil society or for the development of democracy in Hong Kong.

It has been suggested that broad and tough new anti-terrorism laws in countries such as the United Kingdom, Canada and Australia make it hypocritical for "critics in the West...[to] stand in judgment of draconian security legislation" in the East. This may be true, but it would be also be hypocritical for those such as myself who have criticized many of these new measures in the West [4] not to criticize their export to the East. It has also been suggested that broad new western security laws undercut "any argument that seeks to defend security legislation with reference to cultural relativism and the unique significance in Asia of the community".[5] For better or worse, there was significant convergence between Hong Kong's security bill and western anti-terrorism legislation and those convergences may be well be stressed in any attempt to revive the Article 23 process. Nevertheless, there were distinctive elements in both the wording of Article 23 and Hong Kong's security bill not found in western democracies. In particular, the criminalization of secession and subversion

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[4] My own concerns about the challenge that Canada's new anti-terrorism laws pose to my country's democracy, courts, law, and sovereignty are discussed in Roach "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism" (2002) 47 McGill L.J. 893; K. Roach *September 11: Consequences for Canada* (Montreal: McGill Queens Press, 2003).
[5] Victor V. Ramraj "Terrorism, Security and Rights: A New Dialogue" [2002] Sing.J.of Legal Studies 1 at 2.

and the reference in Article 23 to the criminalization of foreign political organizations were significantly out of step with norms in western democracies.

In the first part of this chapter, I will outline some of the older features of Article 23 and the security bill that distinguished it from other post-September 11 legislation. These include the prior commitment in Article 23 of the Basic Law to enact laws to prohibit any act of treason, secession, sedition, subversion, and the prohibition of foreign political organizations from conducting politics in the region. I will argue that attempts to argue that the Hong Kong bill followed the Canadian law on treason, sedition and secession were not convincing. Although laws against treason and sedition may remain on the books in many democracies, they are something of a dead letter. Moreover crimes of secession and involvement with foreign political organizations are unknown in Canada even though it deals regularly with a secessionist threat in Quebec. Criminal sanctions for disloyalty to one's country are on the retreat in western democracies[6] and their revival in Hong Kong would have distinguished Hong Kong from many democracies.

In the second part of this chapter, I will examine those features of the bill that pursued a newer vision of security against modern terrorism and echoed the United Kingdom's *Terrorism Act, 2000* and post-September 11 anti-terrorism laws in a wide range of countries including Hong Kong, Canada, Australia and New Zealand. Such comparisons between the security bill and post-September 11 anti-terrorism laws were not highlighted in either the Hong Kong government's consultation draft or its explanatory notes to the bill. One reason may have been that the security bill, even after it was amended, did not contain important safeguards for protests, advocacy and strikes enacted in post-September 11 anti-terrorism laws in Hong Kong and other countries. My hope is that comparisons between the security bill and new anti-terrorism laws will shed some new light on the bill and assist in understanding some flaws in the bill that could be remedied should the bill be revived some time in the future.

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[6] This is a distinct and narrower point than the broader idea that the criminal sanction can be defended on the basis of the value and morals of the community as opposed to the more limited and liberal vision of using the criminal law to protect individuals. This latter idea is sometimes associated with so-called Asian values defences of the criminal sanction, but it is also found in some western discussions of criminal justice. See Lord Devlin *The Enforcement of Morals* (Oxford: Oxford University Press, 1965). On the continued relevance of Devlin's more communitarian approach to the criminal law see J.P.McCutcheon "Morality and the Criminal Law: Reflections on Hart-Devlin" (2002) 47 C.L.Q. 15. I am indebted to Carole Petersen for challenging me to clarify this point.

I. The Old: Distinctive Elements of the Article 23 Process

Article 23 was developed long before the terrorist attacks of September 11 and in part as a concession to the People's Republic of China after Tiananmen Square.[7] Article 23 of the Basic Law provides:

> The Hong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

Regardless of the events of September 11, Hong Kong was committed by Article 23 to prohibiting treason, secession, sedition, and subversion and to prohibiting foreign political organizations. In what follows, I will argue that these elements of Article 23 are based on an older vision of loyalty to the state and hostility to foreign political influence that despite September 11 remains on the wane in western democracies.

A. Treason

Although laws against treason remain on the books in many western democracies, they are as archaic as the language of killing or alarming Her Majesty the Queen still found in the Criminal Code of Canada[8]. In 1986, the Law Reform Commission of Canada observed that the Canadian offence of high treason was "embalmed in language that was first enacted in 1351".[9] To be fair, there had been some modernization since the 1351 Statues of Treasons enacted during the reign of Edward III. That first codification of treason made it a crime "when a man doth compass or imagine the death of our Lord the King, or of our Lady his Queen or of their eldest son and heir; or if a man do violate the King's companion" or "to counterfeit the King's great or privy seal, or his money", as well as to levy war against the King or to be an adherent to his enemies.[10] Things have also improved in Canada since a judge, when convicting a person of treason in the aftermath of the French

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[7] See C. Petersen "A Naked Emperor: The Process of Enacting Hong Kong's Security Legislation" this volume on the historical background of Article 23.

[8] RSC 1985 c.C-34 ss.46(1)(a) and 49

[9] Law Reform Commission of Canada *Crimes Against the State* Working Paper 49 (Ottawa: Law Reform Commission of Canada, 1986 at 35.

Revolution and related rumblings of rebellion in the colonies, ordered that the offender be "hanged by the neck, but not till you are dead, for you must be cut down alive and your bowels taken out and burnt before your face; then your head must be severed from your body, which must be divided into four parts, and your head and quarters be at the king's disposal; and the Lord have mercy on your soul."[11]

To be sure, there is some support in western democracies for retaining the law of treason. The United Kingdom Law Commission in 1976 recommended that treason be retained as an offence. Even though treason would in its view involve the commission of other crimes, the term treason would "emphasize the particularly reprehensible character of the conduct."[12] The Law Reform Commission of Canada recommended in 1986 that treason be retained because "it is a term that is familiar to Canadians as meaning the crime of betraying one's country".[13] But that document was part of a larger and failed project to enact a new Criminal Code. The Commission was in part trying to win support for this project by stressing not only the need to modernize the Code, but also the need for some continuity in the Code. The fact that treason has long been a crime, however, is not an adequate basis for its retention, especially when there are other crimes that cover violence, destruction of property or the revealing of state secrets. The Law Reform Commission's more substantive argument in favour of treason was based on the reciprocal obligations of the state and the individual. [14] But the state delivers less and less to the people in this neo-liberal globalized world. In turn, people are more and more free agents who can move from country to country in search of a better life. It is far from clear in this modern age whether the mere fact of citizenship or residency in a state should result in unconditional fidelity to the state. The Law Reform Commission's support for the crime of treason should not be taken as a sign that there is broad based enthusiasm for the treason offence in Canada or other western democracies.

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[10] As quoted at ibid p.5. See also Treason Act 25 Edw, 3, c.2.

[11] *R. v. Maclane* (1797) 26 State Trials 721 at 826 as quoted in M.L. Friedland *National Security: The Legal Dimensions* (Ottawa: Supply and Services, 1980) at 13.

[12] The Law Commission *Codification of the Criminal Law: Treason, Sedition and Allied Offences* (Working Paper No. 72) (London: HSMO, 1977) at 37.

[13] Law Reform Commission of Canada *Crimes Against the State* supra at 46

[14] "If an individual chooses to betray the State and other inhabitants by dragging the country into war or violent revolution, the State and other inhabitants have the right to treat him as a criminal." Ibid at 44.

As George Fletcher has recently argued there has not been a revival of treason laws in the west even though they could be applied to some people who assisted their countries enemies. For example. John Walker Lind, the American who joined Taliban forces in Afghanistan was not charged with treason. Instead he was charged and convicted of a more modern offence involving support for terrorism.[15] Likewise, an American soldier at Guantamo Bay, Cuba who is alleged to have assisted Syria has been charged with espionage, but not treason. [16] George Galloway, a member of parliament who called on British troops to disobey orders in Iraq and who is alleged to have received much money from Saddam Hussein, has not been charged with treason. [17] In Indonesia, however, the Muslim cleric Abu Bakar Bashir, was charged and convicted of treason on the basis of his alleged intent "of toppling the government and fulfilling his intention of setting up the Islamic state of Indonesia." Such a charge, however, raised concerns about freedom of religion, especially given the Jakarta court's decision to acquit Bashir of involvement in acts of terrorism and the fact that Bashir had previously been convicted of treason under the repressive regime of Suharto.[18]

In Canada, there is no recent history of treason charges. Those involved in a terrorist group dedicated to the separation of Quebec from Canada were not charged with treason when in October of 1970 they kidnapped and murdered two high officials even though their actions arguably fell within the use of "violence for the purpose of overthrowing the government of Canada or a province".[19] There has been no discussion in Canada about possible treason charges against a 16 year old Canadian, Omar Khadr, who apparently joined with al Qaeda and killed an American soldier in a firefight at the Afghanistan/ Pakistan border. [20] The Canadian reluctance to discuss treason charges in this case is not only related to the reality that Khadr is in American custody at Guantanamo Bay, Cuba and

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[15] George Fletcher *Romantics at War: Glory and Guilt in the Age of Terrorism* (Princeton: Princeton University Press, 2002) ch.6.

[16] Eric Schmitt "Airman is charged as a spy for Syria at Guantanamo" *New York Times* 23 Sept. 2003.

[17] Sandro Contenta "British M.P. at Centre of Political Storm" *Toronto Star* 12 May 2003.

[18] M. Moore "Bashir treason trial begins but proof elusive on Bali blasts" *Sydney Morning Herald* 23 April 2003 ; R. Bonner "In setback for U.S. Indonesian cleric cleared of terror charges" *New York Times* 2 Sept. 2003.

[19] *Criminal Code of Canada* s.46(2)(a)

[20] Some of the issues surrounding Khadr's detention and interrogation in probable violation of the Geneva Conventions and his vulnerability to trial before an American military tribunal and possible execution in violation of Article 6 of the ICCPR is discussed in Roach *September 11* supra at 161-163.

will probably not be released to Canada for trial. It also reflects what Professor Fletcher argues is a certain modern embarrassment about the crime of treason. He argues that treason is based on the romantic ideal of loyalty to the state and the collective guilt of a foreign enemy. Although these romantic and emotional ideas are alive and well in public discourse, they remain anomalous in legal discourse where the focus is often on specific acts of violence and individual responsibility.

The Hong Kong bill proposed to modernize the language of treason. It took away the old language of killing or wounding or deposing Her Majesty and replaced it with reference to the Central People's Government. It abolished the common law offences of misprison and compounding treason. It also abolished the old notion that any overt act that manifests an intention to commit treason is a sufficient prohibited act for a treason conviction. It is undeniable that these proposed changes would have reformed and modernized the existing law of treason. They would have produced, with the exception of the proposed abolition of any statute of limitations[21] and the application of the new treason offence to acts outside Hong Kong, a narrower offence of treason than exists on the books in Canada. It is also somewhat narrower than a recently revised treason offence in Australia which codifies the offence of misprison of treason, but which also exempts the provision of humanitarian aid from conduct that assists the enemy.[22]

But there are limits to this modernizing process. Treason can be dressed up in modern language, but it remains an old and archaic offence in a modern world of rapid movement of people between states and the inevitable multiple allegiances that are created in a multicultural world characterized by extensive immigration. Treason may remain on the statute books, but in many western democracies, it has become a dead letter. One danger of a modernized and reformed law of treason would have been that authorities may be more willing to use it.

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[21] *Crimes Ordinance* s.4. (three year limitation) Canada has a similar limitation, but also an interesting six day limitation on laying an information for treason when the overt act that manifests the intention to commit treason is "open and considered speech". *Criminal Code of Canada* s.48.

[22] *Criminal Code Act, 1995* s.80.1 as amended by *Security Legislation Amendment (Terrorism) Act 2002* no.65, 2002. New British anti-terrorism legislation has added new crimes of withholding information about terrorism. *Terrorism Act, 2000* c.12 s.19; *Anti-terrorism, Crime and Security Act, 2001* s. 24 s. 117. New terrorism laws in Indonesia make it an offence to hide information about terrorism. Government Regulation No. 1 Year 2002 Art.13(c).

B. Sedition

Crimes based on sedition are even more archaic than the crime of treason. Their origins lie in the Star Chamber[23] where King James sat and argued it was "high contempt in a subject to dispute what a King can do or say that a King cannot do this or that". [24] Sedition overlapped with treason but the offence of seditious libel made it clear that words alone could be the basis for a charge and also allowed trial in the Star Chamber without a jury. In response to the French Revolution, the offence of seditious conspiracy thrived both in England and the United States. When crimes based on sedition were introduced in Canada's Criminal Code in 1892, an attempt to define what was meant by seditious intent was defeated in large part because of concerns about freedom of speech. The proposed definition included bringing hatred or contempt or to excite disaffection against Her Majesty or her governments. Even without such a broad definition of a seditious intent, there were five sedition convictions in Canada during World War I for statements such as "if no one would give to the Red Cross the war would stop". During the Red Scare after the war, there were more prosecutions and a new offence was enacted that criminalized belonging to an organization that advocated "the use of force, violence, terrorism, or physical injury to person or property or threats of such injury" for "the purpose of bringing about governmental, industrial or economic change within Canada". The leader of the Canadian Communist Party was convicted under this offence before it was repealed in 1936. The legal concept of sedition in Canada was significantly narrowed by the celebrated 1951 decision of the Supreme Court of Canada in *Boucher v. The King*. The Court in a 5:4 decision held that a statement that courts in Quebec were "under priestly thumbs" and that Quebec authorities "crush freedom by mob rule and gestapo tactics" did not constitute seditious libel because there was no "intention to incite to violence or resistance or defiance for the purpose of disturbing constituted authority."[25] The speaking of seditious words, the publishing of a seditious libel and being a party to a seditious conspiracy remain a crime in Canada[26]. A few

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[23] H.L. Fu "Past and Future Offences of Sedition in Hong Kong" in this volume.
[24] W. Conklin "The Origins of the Law of Sedition" (1975) 15 C.L.Q. 277 at 298
[25] *Boucher v. The King* [1951] S.C.R. 265 at 301.
[26] Criminal Code of Canada s.61

people associated with the terrorist Front de Liberation du Quebec were tried but acquitted of seditious conspiracy after the October Crisis of 1970.[27]

Law reforms bodies in Canada have been very critical of the law of sedition. The Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police stressed that the failure to define seditious intention in the *Criminal Code* as limited to an intention to violence presented "a risk that ...the police and others will give the offence a wider meaning than is now the law, when deciding upon the scope of investigation and search." It concluded that the offence should be abolished because when restricted to the incitement of violence, the crime was already covered by other offences.[28] The Law Reform Commission of Canada similarly argued that sedition is an "outdated and unprincipled law" that has its origins in the discredited idea that the ruler could do no wrong and that it was "odd" in a democracy that embraced freedom of expression. It concluded that as a result of *Boucher* the offence of sedition was superfluous "because the only conduct that would be proscribed by it could just as well be dealt with as incitement, conspiracy, contempt of court or hate propaganda". [29]

Should a person ever be charged with a sedition based offence in Canada, the Supreme Court would likely strike down the law under the Canadian Charter of Rights and Freedoms enacted in 1982. The Court would definitely find that the offence violated freedom of expression and would most likely find that there are means less restrictive of freedom of expression of pursuing any of the objectives of the offence. It is noteworthy in this respect that the Court in 1992 struck down the archaic offence of spreading false news largely on the basis that the offence was overbroad and could chill freedom of expression. It concluded that the legitimate state objectives could be targeted more directly and less broadly by reliance on another offence against the wilful promotion of hatred. Even the dissenting judges who would have upheld the law, would have read it down to only apply in

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[27] Much of the above history is taken from my colleague Marty Friedland's excellent monograph *National Security: The Legal Dimensions* (Ottawa: Supply and Services, 1979) ch.2. See also P. MacKinnon "Conspiracy and Sedition as Canadian Political Crimes" (1977) 23 McGill L.J. 622; K. McNaught "Political Trials and the Canadian Political Tradition" (1974) 24 U.T.L.J. 149.

[28] Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police *Freedom and Security under the Law* (Ottawa: Supply and Services, 1981) at 953-954

[29] Law Reform Commission of Canada *Crimes Against the State* supra at 35-36.

such circumstances.[30] Canadian courts would probably strike down the offences based on sedition in their entirety because they are an overbroad, vague and un-necessary restriction on freedom of expression and because their harms are more directly addressed by other offences. We may never know, however, because sedition like treason has become a dead letter in Canada.

The primary definition of sedition in the security bill as the incitement to commit treason, subversion or secession preserved the crime of sedition more in form than substance because the incitement of the other crimes would be a crime even if there was no offence of sedition.[31] However, this conclusion begs the questions of how broadly treason, subversion and secession are defined. As will be suggested below, they are defined quite broadly especially to the extent that they include "serious criminal means".

In recognition that the crime of sedition may have a particularly chilling effect on freedom of expression and freedom of the press, the bill provided in s.9D that certain prescribed acts will not in themselves be regarded as sedition. These exemptions were derived in part from the existing law. One exemption applied to pointing out errors or defects in the government or constitution, but subject to the qualification that the act be done "with a view to the remedying of such errors or defects". [32] In my view, this exception was too restrictive. Not all arguments in a democracy are meant to be constructive. Indeed, some readers may find that some of the arguments made in this chapter are not made with a view to remedying defects in the Basic Law or the bill, but for the sake of critically comparing them with other laws and constitutions. A similar defect was found in the qualification that any statements about matters that produce "feelings of ill-will or enmity between different classes of the population" must be made "with a view to the removal" of such matters.[33] On such emotional topics, it may often be too much to expect that a person has to move beyond mere criticism and also attempt the sometimes hopeless task of removing deep and bitter feelings of ill-will. The Hong Kong judiciary might have interpreted these exemptions in a broad manner similar to that of the Supreme Court of Canada in *Boucher*, but judicial

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[30] *R. v. Zundel* [1992] 2 S.C.R. 731. See also *R. v. Sharpe* [2001] 1 S.C.R. 45 reading down an offence of possession of child pornography to only apply in cases where a harm would be caused and *R. v. Heywood* [1994] 3 S.C.R. 641 striking down a vagrancy offence on the basis that it was overbroad to any legitimate state objective in protecting people from harm.

[31] Albert Chen "The Consultation Document and the Bill: An Overview" in this volume

[32] s.9D(3)(b)

vigilance cannot cure the difficulty that speakers and protesters would have had knowing in advance whether their political or social criticisms would be found to be sufficiently constructive to fall within these exemptions. As the Canadian Royal Commission on the RCMP stressed, offences based on sedition are dangerous because they can be read in a broad fashion by the police and other authorities even if the courts will ultimately interpret them in a restrictive manner because of their concerns with freedom of expression. It would be a positive step for the government to remove the requirement that political or social criticisms must be made with a view to removing errors or defects and feelings of ill-will and enmity.

Another flawed exception applied to attempts to persuade people to change the laws "by lawful means".[34] Civil disobedience as a means of changing unjust laws has a long and honourable history in many democracies. When it was first introduced in October of 2001, Canada's anti-terrorism bill only provided an exemption for "lawful advocacy, protest, dissent or stoppage of work". This flawed exemption was the main inspiration for widespread opposition to the bill that brought together unions, lawyers, civil libertarians, anti-globalization protesters, aboriginal, church and refugee groups who all feared that some of their activities might be targeted as terrorism.[35] Many people pointed out that protests not infrequently violate some laws and that it was inappropriate to treat those who violated minor laws during their protests or strikes as terrorists.[36] To its credit, the Canadian government responded to these concerns and amended the bill to delete the word "lawful" which so severely restricted the exemption of protests and strikes that disrupted essential services from the definition of terrorism. As will be discussed in the second part of this chapter, Hong Kong, Australia and New Zealand have followed the Canadian law in exempting even some illegal protests and strikes from their definition of terrorism. In the security bill, however, the traditional requirement that people must attempt to persuade people to change the law through "lawful means" was retained, even after the government introduced amendments to the bills shortly before it was withdrawn. In my view, all non-

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[33] s.9D(3)(d)
[34] s. 9D(3)(c)
[35] This protest is described in Roach *September 11: Consequences for Canada* (Montreal: McGill Queens Press, 2003) ch. 3.
[36] See D. Schneiderman and B. Cossman "Political Association and the Anti-Terrorism Bill" in *The Security of Freedom*

violent attempts to change the law should have been exempted from the definition of sedition. Even accepting that Hong Kong is required by Article 23 to have an offence of sedition, the exemptions in the security bill were seriously flawed and should have been changed to exempt unconstructive political and social criticism and non-violent civil disobedience and attempts to change the law.

C. Secession

The crime of separatism or secession has a special significance in the People's Republic of China. Concerns about national unity, as well as the status of Tawian and Tibet, figured prominently in China's insistence on Article 23. [37] Article 103 of the PRC's Criminal Code defines a crime of "separatism" that applies to those who "organize, plot or act to split the country or undermine national unification" or "who instigates to split the country and undermine national unification". There is no requirement for violence or even otherwise illegal conduct.

The Hong Kong bill defined secession as a crime in a narrower fashion. A person would have been guilty of the new secession offence if he or she "withdraws any part of the People's Republic of China from its sovereignty by using force or serious criminal means that seriously endangers the territorial integrity of the PRC".[38] The offence applied to actions both inside and outside Hong Kong. The broadest and most problematic of these terms was "serious criminal means" and it will be discussed in greater length in part two of this chapter. At this juncture, however, it should be noted that the bill would have criminalized attempts to achieve secession that caused serious damage to property or serious interference or disruption with an electronic system or an essential service, facility or system (whether public or private).[39]

If the serious criminal means were to be committed outside Hong Kong, there was a requirement that the means used be "an offence" not only under Hong Kong law, but "the law of that place".[40] Even though secession itself is not a crime in Canada or most other democracies, property damage and disruption of electronic systems and essential services would often constitute "an offence" under Canadian federal criminal law, provincial

[37] K. Loper "Hong Kong's New Secession Offence: 'One Country, Two Systems' in One China" in this volume.
[38] S. 2B
[39] S.2A(4)

regulatory law or perhaps even municipal by-laws. The double offence requirement was not a clear requirement that crimes committed outside of Hong Kong be criminal under both the laws of Hong Kong and the country in which the offence is committed. It could be satisfied by an act that would constitute the crime of secession if committed in Hong Kong, but would only constitute a minor non-criminal offence – such as violating a city by-law – in the other country.

The Canadian experience with secession and its relation to the criminal law and national security may be of interest in evaluating the new crime of secession proposed by the security bill. In response to a kidnapping of a British diplomat and a Quebec Cabinet Minister by two cells of the separatist Front de Liberation du Quebec (FLQ) in October of 1970, the federal government declared an emergency and invoked the powers of the War Measures Act. Regulations enacted by the Cabinet in the middle of the night declared the FLQ or any other group who "advocates the use of force or the commission of crime as a means of or as an aid in accomplishing governmental change in Canada" to be an unlawful association.[41] It was an offence to be a member of such organization, to act on their behalf, to advocate their aims, to finance them or provide them with property. Close to 500 people who were associated with Quebec separatism were arrested and detained under these provisions. The vast majority of these people, however, were not terrorists.

In hindsight, many believe the federal and Quebec governments overreacted to the separatist violence. Existing laws concerning conspiracy to commit murder and kidnapping were adequate to deal with the violence. Many innocent people were detained because of their political beliefs and association. The terrorist violence also led to some illegal conduct by the Royal Canadian Mounted Police that targeted non-violent separatists in Quebec. Six years after the violence of the 1970 October Crisis, a political party dedicated to the sovereignty of Quebec was elected by the people as the provincial government of Quebec. In 1980 and again in 1995 referenda were held to determine whether a majority of people would give the government a mandate to negotiate sovereignty from the rest of Canada. The Law Reform Commission of Canada recommended reforms to the law of treason to make clear that "non-violent actions, such as a unilateral declaration of independence or secession

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[40] S. 2A(4)(b)
[41] Public Order Regulations 1970 SOR/70-444.

legislation" are not included in the offence on the rationale that "these matters are best resolved through the political process, rather than by resorting to the blunt instrument of the criminal law."[42]

After a referendum on sovereignty was defeated by the narrowest of margins in 1995, the federal government referred the question of whether a unilateral declaration of independence by Quebec would be consistent with international law or the Canadian constitution. The Supreme Court of Canada unanimously determined that a unilateral declaration of sovereignty by Quebec was not supported by international law and would violate the Canadian constitution. Quebec was not a colony or an oppressed people asserting its right to self-determination. The Court suggested that the resulting crisis that would result should Quebec vote for sovereignty should be resolved by attention to general first principles of the Canadian constitution including the values of democracy, the rule of law, minority rights and federalism.[43] The decision was directed mainly at the relevant political actors and did not in any way suggest that secession or the advocacy of secession should be made a crime.

It would be very wrong to conclude that the Canadian experience lends any support to the creation of a crime of secession. A proposal to enact a crime of secession would be a non-starter in Canada. Arguments that secession should be treated as treason or sedition, although possible given the letter of these archaic laws, are completely outside of mainstream debate in Canada. The criminalization of secession, and with that, of those who attempt or conspire to engage in secession is out of touch with the modern experience of peoples having a right to self-determination and states frequently dividing themselves into smaller units. Even when violence is used in an attempt to promote secession, the Canadian response has been to rely on the ordinary criminal law relating to murder, kidnapping and bombings, rather than to rely on the extraordinary crimes of treason or sedition or the creation of a new offence of secession or subversion.

D. Subversion

Article 105 of the PRC's Criminal Code defines the crime of subversion as applying to "those who organize, plot or act to subvert the political power of the State or to overthrow

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[42] Law Reform Commission of Canada *Crimes Against the State* supra at 31

[43] *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

the socialist system". In addition to imprisonment, a person guilty of this offence may be subject to "public surveillance or deprivation of political rights". This crime itself represents an attempt to modernize the Chinese Criminal Code and to make offences more specific. In other words, the law of the People's Republic of China is not immune from the urge to modernize law that has led to the decline of offences such as treason and sedition in western democracies. The 1997 Criminal Code of China has replaced "crimes of counterrevolution" with "crimes of endangering state security" in recognition of "the development of the nation's politics, economy and society". Thus China has abolished an old offence which defined counterrevolutionary crimes as "all acts which inflict harm on the People's Republic of China for the purpose of overthrowing the regime of the proletarian dictatorship and socialist system."[44] The language has changed, but there remains some striking similarities between the crime of subversion and the old crime of counterevolutionary activities.

The Hong Kong security bill defined subversion more narrowly than on the mainland. Subversion was defined as disestablishing the basic system as established by the Constitution of the PRC or overthrowing or intimidating the Central People's Government "by using force or serious criminal means that seriously endangers the stability of the People's Republic of China or by engaging in war".[45] The crime was narrowly defined so that few, if any, people will be guilty of the completed crime. Instead they would have been charged with inchoate versions of the crime. In other words, people would have likely have been found guilty not of the actual use of force, war or serious criminal means, but rather of attempts and agreements to use such means or even more remote attempts to counsel or procure the commission of the completed offence. Reliance on inchoate forms of liability can expand the scope of the criminal sanction in a manner that is not transparent from reading an offence that defines only a completed crime.

Although crimes of sedition remain on the books of many democracies, few have separate crimes of subversion. In the consultation paper to the security bill, the government referred to the definition of subversive activities in Canada's *Access to Information Act*.[46] This definition, however, only provides a shelter for access to information. This definition is

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[44] Wei Luo *The 1997 Criminal Code of the People's Republic of China* (Buffalo: William Hein, 1998) at pp.14-16

[45] Bill s.2A(1)

[46] Consultation Paper at 5.3 citing *Access to Information Act* R.S.C. 1985 c.A-1 s.12.

not even part of the mandate of Canada's security intelligence agency, let alone an offence in Canada's *Criminal Code*.[47] The reluctance to criminalize subversion or even to mandate the investigation of subversion in many democracies recognizes that subversive ideas are part of the give and take of a robust democracy.

E. Foreign Organizations

Foreign interference in domestic politics has a special significance in China. Article 102 of the Criminal Code of the People Republic of China makes it an offence subject to a minimum of 10 years imprisonment to collude with a foreign state or a "foreign institution, organization or individual" "in plotting to jeopardize the sovereignty, territorial integrity and security of the Motherland". Article 106 underlines the special blameworthiness that is attached to foreign involvement by providing for aggravated punishment when the crimes of separatism, rebellion or subversion are committed in collusion "with a foreign institution, organization or individual".[48] Article 23 of the Basic Law reflects this concern with the foreign as over half of the enactment is directed to requiring Hong Kong "to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."

The emphasis in Article 23 on prohibiting foreign political organizations from conducting political activities in Hong Kong is out of step with the globalization of politics. Many political organizations concerned with human rights, the environment, the protection of women and minorities cross borders. Political parties such as the Green Party have spread throughout Europe and to North America. Advocacy groups such as Amnesty International and Doctors without Borders speak to a new global political consciousness that some see as necessary to balance multinational corporations and global alliances of governments. The fear of and attempt to ban the foreign in Article 23 is bucking the tide of history.

Even in its original form, the security bill did not track the language of either the PRC Criminal Code or Article 23 in its emphasis on prohibiting foreign political organizations. In part this was because the 1997 amendments to the *Societies Ordinance* already implemented Article 23 by allowing the Societies Officer, after consultation with the

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[47] D. W. Choy and R. Cullen "Treason and Subversion in Hong Kong" this vol

Secretary for Security, to refuse to register a political body "that has a connection with a foreign political organization". A foreign political organization is defined to include not only governments but "a political party in a foreign country or its agent". The *Societies Ordinance* already includes offences concerning membership in unlawful societies, allowing meetings of unlawful societies, inciting a person to belong to such societies and supplying aid to such societies. Although there has been some revival of offences based on proscribed organizations in new anti-terrorism laws, the history of proscribed organizations in democracies has been an unhappy one. Restrictions on associational life in Canada are now generally regretted as an overreaction that threatened civil liberties. From my Canadian perspective, I must confess that the entire *Societies Ordinance* seems to be based on a distrust of associations that, with respect, seems odd in a society that proclaims its attachment in its basic law to freedom of speech, conscience and association.

The proposed amendments to the *Societies Ordinance* in the security bill as it was originally introduced contemplated that Hong Kong's Secretary for Security "may" proscribe organizations that are "subordinate to a mainland organization" and which have "been prohibited on the ground of protecting the security of the People's Republic of China, as officially proclaimed by means of an open decree, by the Central Authorities under the law of the People's Republic of China.'[49] There were also provisions for the introduction of certificates that "shall be conclusive evidence of the prohibition".[50] This part of the bill created a danger that national security concepts taken from the People's Republic of China could have been incorporated into Hong Kong [51], thus placing strain on the one country, two systems accommodation. These provisions were fortunately deleted before the bill was eventually withdrawn.

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[48] Wei Luo *The 1997 Criminal Code of the People's Republic of China* (Buffalo: William Hein, 1998) at pp.14-16

[49] Bill s.15 amending s.8A of Societies Ordinance

[50] Bill s.15 amending s.8A(3)

[51] Under the original security bill there might have been an opportunity for security rulings by the Central Authorities to be challenged in the courts of Hong Kong on the basis that the proscription of the organization was not necessary or proportionate in the interests of national security. A successful collateral challenge in Hong Kong to a security ruling by the Central Authorities might, however, as in the right of abode of cases, resulted in a re-interpretation being imposed from the mainland. In Canada, many welcome the dialogue that can occur between courts and legislatures. In Hong Kong, however, a dialogue between Hong Kong courts and legislative authorities on the mainland may have quite a different meaning because of the extraordinary and undemocratic powers that the authorities of the People's Republic of China have to intervene and assert the final word in the dialogue.

Even after the amendments to the Security Bill, the Secretary of Security would still have been enabled to proscribe a local organization that had as one of its objectives the commission of treason, subversion, secession, sedition or an offence of spying. This would have expanded the ambit of the criminal law well beyond the inchoate offences of attempts, conspiracies, counseling or procuring to commit such crimes and imposed guilt by association with a proscribed organization. As will be discussed in the second part of this chapter, this provision followed the emphasis placed on proscription of organizations in the United Kingdom's *Terrorism Act, 2000* and post-September 11 anti-terrorism laws in a number of jurisdictions. The difference, however, was that the security bill did not focus on modern crimes of terrorism, but what I have argued are, in western democracies, the archaic and dead letter crimes of treason and sedition and the non-existent crimes of secession and subversion.

II. The New: Similarities Between the Security Bill and New Anti-terrorism laws

Although the security bill had distinctive features that are either not found or have become a dead letter in most democracies, it also has much in common with new anti-terrorism laws enacted in the United Kingdom and other former British colonies. My criticisms of the security bill are by no means limited to those elements which were distinctive to Hong Kong, but also extend to the borrowing done in the security bill from western security laws, most notably new British and Canadian anti-terrorism laws.

A. Overbroad Definitions: "Serious Criminal Means" and New Definitions of Terrorism

The crucial definition of serious criminal means in the security bill tracked similar language in British and Canadian anti-terrorism legislation, but without the safeguards for protests and strikes found in either Canadian, Australian or Hong Kong anti-terrorism laws. The overbroad definition of "serious criminal means" in s.2A(4)(b) of the bill might have been the single most important part of the bill because it applied to both the new offence of subversion and secession and by implication to sedition. For both subversion and secession, serious criminal means provided a much more problematic alternative to prosecuting a

person for using force or engaging in war against the state. It was the section that was most likely to have been used against protesters.

Serious criminal means was defined in the security bill as any act which is an offence under the law of Hong Kong and:

i) endangers the life of a person other than a person who does the act;

ii) causes serious injury to a person other than the person who does the act;

iii) seriously endangers the health or safety of the public or a section of the public;

iv) causes serious damage to property; or

v) seriously interferes with or disrupts an electronic service or an essential service, facility system (whether public or private)

This extremely broad definition went well beyond violence and attempts to overthrow the government by force and included serious damage to private property, serious danger to public health or safety and serious disruption of a wide range of public and private essential services.

The origins of the broad definition of serious criminal means are found in the United Kingdom's *Terrorism Act, 2000* and to a lesser extent in Canada's *Anti-Terrorism Act, 2001*. The former defines terrorism as the use or threat of action designed to influence the government or intimidate the public and to advance a political, religious or ideological cause to achieve the following prohibited acts:

1) serious violence against a person
2) serious damage to property
3) endangering a person's life, other than the person committing the action
4) the creation of a serious risk to public health or safety
5) serious interference or disruption of an electronic system[52]

The definition of serious criminal means in the security bill was obviously inspired by the United Kingdom's definition of terrorism. The security bill simply subsumed the reference to serious violence against a person into broader provisions relating to endangering life and serious injury. In other respects, it followed the U.K. law in prohibiting endangering public health or safety, serious damage to property and serious interference or disruption of an electronic system. As suggested in the introduction of this chapter, these prohibited harms

[52] *Terrorism act, 2000* U.K. ch. 11 s.1(2).

are united by a new vision of security which is threatened by modern terrorist techniques. The dangers of these techniques are not to be underestimated as they include the horrors of chemical, biological or nuclear terrorism that could devastate public health and safety, the destruction of private property such as the World Trade Centre, the disruption of essential utilities such as power and water and cyber-terrorism that disrupts electronic computer systems that provide vital services.

At the same time, however, the new British definition of terrorism is very broad especially when compared to the definition of terrorism in s.20 of the previous *Prevention of Terrorism (Temporary Measures) Act, 1989* which was limited to "the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear."[53] Canada has by and large adopted the definition of terrorism in the *Terrorism Act, 2000*. The breadth of Canada's new definition of terrorism is well illustrated by the fact that the Supreme Court of Canada has interpreted an undefined reference to terrorism in Canada's Immigration Act in a much more restricted manner. The Canadian Supreme Court used a definition of terrorism taken from the 1999 International Convention on the Suppression of the Financing of Terrorism that defined terrorism as "any act intended to cause death or serious bodily injury to a civilian" where the act is designed "to intimidate a population or to compel a government or an international organization to do or abstain from doing any act". Despite noting that this definition "catches the essence of what the world understands by "terrorism', the Canadian Supreme Court hastened to add that the Canadian legislature was free to adopt a different definition, as indeed it has in Canada's 2001 *Anti-terrorism act*.[54]

The broad new British and Canadian definitions of terrorism are rightly controversial. Although he recognizes that the new British definition "is broader than most equivalents in international law", Professor Clive Walker of Leeds is generally sympathetic and concludes that the new law "forms a permanent monument to the fragmented risk of terrorism in the late modern, globalized world." [55] Professor Andrew Ashworth of Oxford, however, expresses, much greater concern. He has criticized it as an "elastic" definition that

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[53] Ch. 4 s. 20.
[54] *Suresh v. Canada* (2002) 208 D.L.R.(4th) 1; [2002] S.C.C 1 at para 94
[55] Clive Walker *Blackstone's Guide to the Anti-Terrorism Legislation* (Oxford: Oxford University Press, 2002) at 29, 37.

"introduces a much wider concept of terrorism than existed previously and one that might well embrace forms of so-called organized crime." He adds that the "emotive sway" of labels such as terrorism "makes it particularly important to take a critical view of the definitions employed, and to be on guard against the covert expansion" of crimes and of "normalizing the exceptional".[56] In my view, there are real questions whether it is necessary to define all politically motivated serious damage to property or serious disruptions of electronic systems as terrorism. Some in the anti-globalization, environmental and animal rights movements fear that they could be labeled as terrorist under such broad laws even if they have committed no acts of violence.

Despite these problems, the broad British definition of terrorism has been very influential, not only in Hong Kong, but other former British colonies. The Canadian definition of terrorism follows the British, but takes a more restrictive approach with respect to property damage and requires that such damage be so extensive that it will cause death or bodily harm, danger to life or a serious risk to public health or safety.[57] Thus the politically motivated destruction of property that presents no danger to human life and safety would not satisfy the legal definition of terrorism in Canada. New Zealand has also placed similar qualifications on the amount of property damage [58], but Australia has followed the British approach of including all "serious damage to property."[59]

In some respects, the Canadian definition of terrorism is broader than the British and has influenced both Hong Kong's security bill and its new anti-terrorism law. [60] Terrorism in Canada includes not only serious disruptions of electronic systems, but serious disruptions of "an essential service, facility or system, whether public or private". [61] This seems to be the origin of the reference in both Hong Kong's anti-terrorism law and the security bill to the serious interference or disruption of "an essential service, facility or system (whether public or private)." I have reservations about whether it is necessary to define security threats so broadly in either the law of Canada or Hong Kong. In both cases,

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[56] Andrew Ashworth *Human Rights, Serious Crime and Criminal Procedure* (London: Sweet and Maxwell, 2002) at 95, 107.
[57] *Criminal Code of Canada* s. 83.01(b) (ii)(D).
[58] *Terrorism Suppression Act 2002* s.5
[59] *Criminal Code Act 1995* s.100.1
[60] I examine the Canadian definition of terrorism in greater detail in K. Roach "Canada's New Anti-Terrorism Law" [2002] Singapore J. of Legal Studies 122-148.
[61] *Criminal Code of Canada* s.83.01(b)(ii)(E)

this broad definition runs the risk that strikes or protest by essential workers, the disruption of roads by peaceful protest and vandalism against private or public corporations that deliver essential services could be deemed and treated as security threats.

Australia retained the British approach of only covering serious disruptions of electronic systems, but then defined such systems broadly to include information systems, telecommunication systems, financial systems, systems used for the delivery of essential government services, systems to deliver essential public utility and transport systems.[62] This non-exclusive definition of what constitutes an electronic system under Australian law demonstrates the potential and staggering breadth of new anti-terrorism laws that prohibit not only political violence, but political disruptions of electronic systems and essential public or private services.

Hong Kong's own *United Nations (Anti-Terrorism Measures) Ordinance*[63] defined a terrorist act as an action, including in the case of a threat, the action if carried out that:

A) causes serious violence

B) causes serious damage to property;

C) endangers a person's life, other than that of the person committing the action;

D) creates a serious risk to the health or safety of the public or a section of the public;

E) is intended seriously to interfere with or seriously to disrupt an electronic system; or

F) is intended seriously to interfere with or serious to disrupt an essential service, facility or system, whether public or private

The definition of serious criminal means in the security bill followed Hong Kong's (and the United Kingdom's, Canada and Australia's) definition of terrorism.

At the same time, however, there are safeguards in Hong Kong's anti-terrorism measures that were unfortunately left out of the security bill. One was the requirement in the anti-terrorism measures that the action or threat be "intended to compel the Government or to intimidate the public or a section of the public; and made for the purpose of advancing a political, religious or ideological cause." The definition of serious criminal means in the security bill had no such requirement. More importantly, the *United Nations (Anti-Terrorism Measures) Ordinance* has an important exemption for harms listed above in (D)

[62] *Criminal Code Act 1995* s.100.1

[63] Cap 575

(E) or (F) from the definition of terrorism if "the use or threat of action" was "in the course of any advocacy, protest, dissent or industrial action". This exemption was even broader than similar exemptions found in Canadian and Australian anti-terrorism laws because it also applies to threats to public health and safety that could be caused, for example, by strikes of nurses and police officers. The exemption in the *United Nations Ordinance* honours the rights to strike and protest recognized in the Basic Law and it should have been included in the security bill to qualify the breadth of serious criminal means and to ensure that protests and strikes that disrupt essential services and electronic systems were not treated as security crimes.[64] It was, unfortunately, not included in the amendments made to the security bill before it was withdrawn.

In the security bill, the Hong Kong government followed the British example of providing no exemption for strikes and protests while at the same time borrowing the Canadian expansion of the prohibited harm from serious disruptions of electronic systems to serious disruptions of all essential services. The result was to create a serious danger that protests and strikes that interfere with an essential service, facility or system (public or private) could have been considered serious criminal means for the purpose of a sedition, secession or subversion charge under the security bill. It is difficult to understand why the government did not place the same type of exemption that appeared in its own new anti-terrorism law into the security bill.

The definition of serious criminal means was the broadest and most problematic part of the definition of the new crimes of subversion and secession in the security bill. It was clearly inspired by the broad definition of terrorism in the United Kingdom's *Terrorism Act, 2000* as well as new anti-terrorism laws in Hong Kong and Canada. It raised questions whether it was necessary that all serious damage to property and all serious interference with essential services and electronic systems must be included as illegal means to commit subversion or secession. Even when it introduced other amendments restricting the ambit of the security bill, the government failed to address legitimate concerns that the broad definition of serious criminal means could have been applied to protests and strikes. The

[64] The fact that the security bill, unlike the *United Nations Ordinance*, does not apply to the threat of serious force does not in my view justify the exclusion of the exemption. The definition of serious criminal means, without the exemption, could be applied to strikes and protests that disrupt essential systems and services even though they do not involve any threat of force.

government failed to exempt protests and strikes from the definition of serious criminal means in the security bill in the same manner as was done in Hong Kong's own *United Nations (Anti-Terrorism Measures) Ordinance*, not to mention other new anti-terrorism laws in Canada, Australia and New Zealand. [65]

B. The Centrality of Inchoate Liability

The security bill defined the completed crimes of treason, sedition, secession and subversion in such terms that few if any people would have been liable for the completed crimes. Instead they would have been charged with inchoate offences such as attempts[66] or conspiracy[67] to commit the crimes or counseling or procuring the commission of such crimes.[68] The judiciary might have made robust allowance for freedom of expression and democracy in determining the precise ambit of the inchoate forms of the new offences. Although the consultation paper's proposal to enact statutory forms of inchoate liability could have produced problems of its own, the failure to define inchoate liability in the security bill meant that the full extent of criminal liability wa not apparent on the face of the bill. There was even a possibility that common law forms of inchoate liability such as incitement could have been applied to the crimes in the security bill. This would have aggravated the lack of transparency implicit in reliance on inchoate forms of liability not found in the security bill itself.

C. Extraterritorial Effects

A common feature of new anti-terrorism acts is that they apply to acts of international terrorism that are committed outside the domestic jurisdiction. For example, s.1 of the *Terrorism Act, 2000* defines action to include action outside the United Kingdom and defines harm to the public or property and attempts to influence "the government" as meaning a government of a country other than the United Kingdom. Canada's new crimes of terrorism apply to actions inside and outside of Canada. It can be argued that the extra-territorial effects of new anti-terrorism laws are required by the global nature of modern terrorism. Whatever the justification for giving anti-terrorism laws extra-territorial effect, it is beyond doubt that this feature of the new anti-terrorism laws significantly expands the

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[65] Terrorism Suppression Act, 2002 S.N.X. no. 34 s.5(5).
[66] Crimes Ordinance s.159G
[67] ibid s.159A
[68] *Criminal Procedure Ordinance* cap 221 s. 89.

ambit of the criminal sanction and may target those who lend support for violent liberation movement abroad. The Canadian Supreme Court has taken note that part of the difficulty in defining terrorism has been because groups such as the African National Congress could fall under some definitions of terrorism.[69] There are concerns in Canada and other countries that people that may lend financial and other forms of support to dissent in their homeland may be vulnerable for prosecutions in Canada as terrorists.

Hong Kong's security bill followed new anti-terrorism laws by applying to actions committed outside of Hong Kong. The proposed crimes of treason, subversion, secession and sedition could all have applied to actions done outside of Hong Kong by a person bound by the offence. In addition, there was a specific provision dealing with extra-territorial conspiracy and attempts for subversion and secession.[70] As with the new anti-terrorism acts, all of these provisions would have expanded the ambit of the criminal sanction. One important difference, however, was that Hong Kong's proposed treason, sedition, subversion and secession offences were all directed only towards actions against the People's Republic of China and the Central People's Government. The security bill did not criminalize treason, subversion, secession or sedition against all governments in the same way that the British and Canadian anti-terrorism laws criminalize support of terrorism against all governments. The older vision of security as based on the dangers of betraying a particular state- namely the People's Republic of China- produced a narrower law than the new vision of global security in new anti-terrorism laws which targets terrorism throughout the world.

D. Executive Proscription of Groups

In common with new anti-terrorism laws in many countries, the security bill, along with existing powers under the *Societies Ordinance*, would have allowed the executive branch of government to declare organizations to be illegal. Such powers are found in the anti-terrorism laws of the United Kingdom, Canada, Australia, and New Zealand, but not of the United States. I hasten to add, however, that this should not be construed as support for the power either in Hong Kong or elsewhere. The banning of organizations and the criminalization of association with banned organizations in my view moves uncomfortably

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[69] *Suresh v. Canada* supra
[70] s.2C

close to guilt by association and status based crimes and away from the traditions of individual responsibility for overt acts of harms and attempted harms as the basis for criminal liability. Such laws present a serious threat both to freedom of association and to the role of the independent judiciary in determining which groups are engaged in illicit activity especially when viewed in light of less drastic alternatives such as punishing criminal conspiracies, and attempts to commit or procure the commission of such crimes..

Section 5 of the United Kingdom's *Terrorism Act, 2000* enables the Secretary of State to proscribe any organization "concerned in terrorism". The Secretary of State can be asked to take a terrorist organization off the list and there is an appeal to an agency with the Orwellian title of Proscribed Organizations Appeal Commission with a further possible appeal to the courts on a question of law. A leading authority on British anti-terrorism law, however, has concluded that "domestic judicial review is unlikely to pick up anything other than disastrously and patently ill-founded cases or ill-argued cases."[71]

In Canada, the Cabinet establishes a list of terrorist organizations. As in the United Kingdom, there is no requirement that the organization be notified or heard before it is listed. An appeal can be taken to a judge of the Federal Court who can order the organization to be removed from the list if the Cabinet's decision is unreasonable.[72] This procedure, like the British one, is unlikely to provide a fine tuned review of the Cabinet's decision. In most cases, it can be expected that the judge will uphold the Cabinet's decision as reasonable. This judicial decision can be made in Canada on the basis of evidence that has not been seen by the organization challenging the listing. In some cases, the undisclosed evidence may be summarized for the organization challenging its listing, but in other cases the evidence may not even be summarized.

Section 8B of the security bill's proposed amendments to the *Societies Ordinance* provided that before an organization is proscribed, it must, unless it is not reasonably practicable, be given an opportunity to be heard or make written representations. Neither the United Kingdom or Canadian anti-terrorism laws allow for organizations to be informed or heard before they are listed as a terrorist group. A person charged under the *Societies Ordinance* with participating in a proscribed organization also could have appealed the

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[71] See C. Walker *Blackstone's Guide to the Anti-Terrorism Legislation* supra at 61.
[72] Criminal Code of Canada s.83.05(6)(d).

proscription decision on grounds of legal or factual error or lack of evidence to justify a reasonable belief that the proscription was necessary and proportionate for the purpose of national security. It is far from clear whether a person accused of a criminal offence based on association with a proscribed organization in either the United Kingdom or Canada can, in the course of his or her criminal trial, challenge the executive decision to list the group. The procedures in the security bill for challenging an executive decision to proscribe a group either before or after the executive made its proscription decision were more generous than the procedures found in the United Kingdom and Canadian anti-terrorism legislation. Even the best procedural protections, however, cannot cure illiberal criminal laws that punish mere membership in, support for or association with proscribed organization.

E. Criminal Offences of Membership in and Association with Proscribed Groups

Section 11 of the United Kingdom's *Terrorism Act, 2000* makes it an offence to be a member of a proscribed organization or to profess to belong to a proscribed organization. It is a defence if the person can establish that the organization was not proscribed by the Secretary of State when he or she joined or that the person has not taken part in the activities of the organization at any time while it was proscribed. There is also a broad range of offences that attach to involvement with illegal or proscribed terrorist organizations. These include inviting financial or other support for a proscribed organization, arranging a meeting to support the organization or a meeting that will be addressed by a member of the proscribed organization.[73] It is also on offence to wear clothing that arouses "reasonable suspicion that he is a member or supporter of a proscribed organization."[74] These membership offences are worded in such a way that the offence is committed by dealing with a proscribed organization. The prosecution would only have to establish that the organization was in fact proscribed not that it actually is a terrorist group. Executive determination of proscribed organization can usurp judicial powers in a prosecution by allowing the executive as opposed to the judiciary decide whether a group is a terrorist group or a threat to national security.[75]

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[73] Terrorism Act, 2000 s.12
[74] s.13 See also ss. 15-19 and 56.
[75] N. Lyon "Constitutional Validity of the Public Order Regulations" (1971) 18 McGill L.J. 136; D. Paciocco "Constitutional Casualties of September 11" (2002)16 S.C.L.R.(2d) 199

Making membership in an organization a crime moves in the direction of punishing a person for their status and their beliefs as opposed to their actions. In Malaysia and Singapore, people can be detained on the basis that they are deemed by the executive to constitute a security threat.[76] The British offence of membership in a proscribed organization does not go that far, but it moves in that direction.

Canada has made it a crime to knowingly participate in or contribute to any activity of a terrorist group for the purpose of enhancing the ability of the group to commit any terrorist crime.[77] The breadth of this new offence is underlined by provisions which make it clear that a person may be guilty of this offence even though no terrorist activity is committed and is supported by evidence that a person "frequently associates with any of the persons who constitute the terrorist group" or "uses a name, word, symbol or other representation" associated with the terrorist group.[78] In some respects the Canadian offence of participation in the activity of a terrorist organization may be even broader than the British offence of membership because a person could be guilty of participating in a terrorist organization even if he or she is not a member and does not profess to be a member of a terrorist organization as required under s.11 of the United Kingdom legislation. In contrast, the United States has not made it a crime to be either a member or an associate of a terrorist group. It has successfully prosecuted members of al Qaeda sleeper cells not on the basis that they are members of that terrorist group, but on the basis that they committed the criminal act of providing material support for terrorism.[79]

The security bill followed the *Societies Ordinance* in enacting a broad range of offences that apply to those who are a member or associate with a proscribed organization. The offence applied to those who are an office bearer or profess to be one; those who are or act as a member, attend a meeting, or give money or any other form of aid to the proscribed

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[76] T. Lee "Malaysia and the Internal Security Act" [2002] Sing. J. of Legal Studies 56.
[77] Criminal Code of Canada s.83.18
[78] ibid s.83.18(4)(b).
[79] Section .805 of the United States's *Patriot Act* expanded the offence of providing material support for terrorists. Material support is defined broadly as meaning the provision of "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious assets." This offence demonstrated the ability of the Americans to draft crimes in a manner that is both precise but also very broad. One court has suggested that the reference to "training" may be overly broad. *Humanitarian Law Project v. Reno* 205 F 3d 1130 (9th Cir.) cert denied 121 S.Ct. 1226 (2001)

organization. In amendments introduced before the security bill was withdrawn the government provided that it was not an offence to give money or aid to a proscribed organization if the prior written approval of the Secretary for Security was obtained or to provide legal services for a proscribed organization.[80] These amendments were fairly limited because they required a person to notify the Secretary and risk both disapproval by the Secretary of Security and prosecution before they paid money to a proscribed organization. The exemption of the provision of legal services to a proscribed organization is praiseworthy and could facilitate attempts by a proscribed organization to challenge its proscription. Nevertheless, the provision of other essential services to a proscribed organizational, including perhaps the provision of medical or spiritual assistance to an organization, could have been prosecuted for giving aid to a proscribed organization without the prior written approval of the Secretary of Security.

There were some limited defences in the security bill available for a person accused of being an officer, member or attending the meeting of a proscribed organization. It was a defence if the accused could prove both that he did not know and had no reason to believe that the organization was proscribed. This not only imposed a reverse onus on an accused who faced up to three years imprisonment for attending a meeting, but also required the accused's mistaken belief that the organization was not proscribed to be both honest and reasonable.[81] In contrast, the Canadian comparable Canadian law requires subjective fault for the accused. There is a respectable argument in Canada that the stigma and penalty attached to a conviction involving terrorism, like murder and war crimes, requires the prosecutor to prove subjective fault beyond a reasonable doubt.[82] In principle, a person should not be punished as a terrorist or a security risk for negligent conduct.

F. Can the Courts Save Us From Ourselves?

An offence that makes membership in any group a serious criminal offence subject to imprisonment for 10 years, as the British offence does, would seem to be a prima facie violation of freedom of assembly and association. Offences that make it illegal to profess to be a member of a proscribed organization, arrange a meeting of the organization or wear clothing associated with a proscribed organization also seem to violate freedom of

[80] Security Bill s.8C (as amended)
[81] Security Bill s.8C

expression. The crucial question under rights protection instruments such as the European Convention on Human Rights is whether such offences can be justified on the basis that they are provided by law and are necessary in a democratic society in the interests of national security or public safety, public order or for the protection of the rights and freedoms and others.

The United Kingdom government is confident that any limitations on freedom of expression and association implicit in various offences of belonging or supporting a proscribed organization will be upheld as necessary and proportionate limits on such rights. They have not sheltered these offences with a formal derogation of rights under Article 15 of the European Convention, as they did with previous provisions concerning preventive detention.[83] It is likely that these offences will be upheld as necessary national security and public safety limits on freedom of expression and association. Recently the Grand Chamber of the European Court of Human Rights upheld the prohibition of an Islamic political party in Turkey on the contentious basis that "a political party whose leaders incite violence or puts forth a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognized in the democracy cannot lay claim to the Convention's protections against penalties imposed on those grounds."[84] If the European Court of Human Rights so easily accepts the banning of a popular political party, it is likely that they will accept the prohibition of terrorist organizations.

The security bill's offence, punishable by three year's imprisonment, of being a member of attending a meeting of a proscribed organization seems to be a prima facie violation of the right to freedom of association or expression as protected in various rights protection instruments including the International Convenant on Civil and Political Rights. The security bill provided that the ordinance should "be interpreted, applied and enforced in a manner that is consistent with Article 39 of the Basic Law". This provision, which is repeated in several other parts of the security bill, invites courts to interpret the law in a manner consistent with the rights and the limits of the ICCPR. The government did not propose the security bill as emergency legislation that derogated from rights. The reference

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[82] *R. v. Martineau* [1990] 2 S.C.R. 633; *R. v. Finta* [1994] 1 S.C.R. 701.
[83] *Brogan v. United Kingdom* (1988) 11 E.H.R.R. 117.
[84] *Refah Partisi (The Welfare Party) and others v. Turkey* at paras 123, 98 13 February 2003.

to Article 39 made it clear that Article 23 did not displace these other rights.[85] This was a praiseworthy provision which indicated that the security bill, if enacted, could have been challenged court as inconsistent with the Basic Law and the ICCPR.

At the same time, it would be wrong to think of the rights in the ICCPR as absolutes or that the possibility of judicial review is a sufficient guarantee of robust civil society. The limitation clauses on each right recognizes the legitimacy of necessary and proportionate limits on the rights in the name of national security and public order. There is a possibility that courts will insist on a rigourous justification test. Offences of membership or association with organizations represent a direct and massive infringement of freedom of association and expression. Threats to both national security and public order can be addressed in a more proportionate means by offences that targets attempts and conspiracies to commit specific crimes. Nevertheless, there is a danger that judges will give great weight to the fact that national security is a valid reason for limiting rights and will not demand rigourous proof of the necessity and proportionality of each security measure. The Grand Chamber of the European Court of Human Rights has recently upheld the prohibition of an Islamic party in the name of democracy. [86] The defenders of anti-terrorism and national security laws will argue that they are necessary to protect both democracy and national security. Courts may well find such arguments to be persuasive even though there are less drastic means to address various security threats. Judicial acceptance of broad anti-terrorism or national security laws may be part of a phenomena that Doreen McBarnet has labeled as due process being for crime control.[87] By this she means that the laws such as the ICCPR that are designed to protect the rights of the accused also legitimize the state's interests in crime control and national security. The same vague concepts of proportionality and necessity that are designed to protect rights can also be used to limit them. Courts in Hong Kong may well defer to the Secretary of Security's determination that the proscription of an organization is a necessary and proportionate restriction on rights. This deference may be related to the fact that the Secretary must form a belief that the proscription "is necessary in

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[85] In Canada, the courts have held that one part of the constitution such as guarantees for schools for certain religions cannot be invalidated under other parts of the constitution such as the guarantee of no discrimination on the basis of religion. *Adler v. Ontario* [1996] 3 S.C.R. 609.

[86] *Refah Partisi (The Welfare Party) and others v. Turkey* at paras 123, 98 13 February 2003.

[87] D. McBarnet *Conviction: The Law, the State and the Construction of Justice* (London: MacMillan, 1981).

the interests of national security and is proportionate for such purpose."[88] The courts will effectively be reviewing a prior determination of the Secretary that the proscription satisfies the requirements of the ICCPR and the temptation to defer to executive determinations of constitutionality may be great, even though the independent judiciary is in a better position than the executive to respect the rights of unpopular minorities.[89]

There is nothing stopping the independent judiciary from taking a more demanding approach and invalidating executive decisions to proscribe a particular organization or indeed the whole process of proscribing organizations and punishing people for belonging, associating or supporting an organization. Judges could well determine that the harm of such offences to freedom of association and expression are disproportionate to their value in stopping security threats when compared to the less drastic alternatives of punishing people when they illegally conspire or counsel the commission of security crimes. Similar arguments could apply to the offence of sedition which is covered by other crimes. As one judge has eloquently argued, the fact that judicial decisions may restrain the ability of the state to protect its security "is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security."[90] The judiciary will have some difficult decisions to make and soul searching to be done when deciding cases under broad new anti-terrorism and under an Article 23 security law, should it eventually be revived and enacted in law in Hong Kong.

To its credit, the United States has not made membership or participation in a terrorist group a crime even after September 11. This raises an interesting issue about the style of rights protection in the United States compared to Europe, Canada and Hong Kong. The 18th century American Bill of Rights is at least rhetorically articulated in absolutist

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[88] *Societies Ordinance* s.8A(1).

[89] Judicial review can be seen as a form of dialogue between the legislative and executive branches of government and the judiciary. For arguments that executive and legislative claims to be able to interpret the ambit of constitutional rights should be reserved for extraordinary and emergency circumstances see K. Roach "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 79 Can.Bar Rev. 481.

[90] *Public Comm Against Torture in Israel v. Govt, of Israel* per President Barak as quoted in A. Barak "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 Harv.L.Rev. 16 at 148.

terms. The First Amendment provides "Congress shall make no law ...abridging the freedom of speech...or the right of the people peaceably to assemble". In contrast, modern post-World War II bills of rights including the European Convention and the Canadian Charter contemplate that reasonable and necessary limits can be prescribed by law on freedom of expression and association. Governments in the United Kingdom, Canada and now Hong Kong have all stressed that their new security laws are consistent with their bills of rights. The laws are proposed as permanent measures that will be subject to rights protection instruments as opposed to emergency measures that override or derogate from rights. The ultimate judicial response to these broad new crimes of terrorism is not yet known, but there are serious concerns that neither modern bills of rights nor the judiciary may provide adequate protection for freedom of association and expression in a world increasingly pre-occupied with security threats. There will be a temptation for the judiciary to be more willing to accept reasonable limits on rights in a post-September 11 world. The American judiciary will not be immune from this temptation, but traditions of respect for a more or less absolutist understanding of freedom of expression and association has so far prevented the United States from making membership in a terrorist organization or mere association with a terrorist organization a crime.

Hong Kong's security bill, like most new anti-terrorism laws, was proposed as permanent legislation. Terrorism and other threats to security are no longer confined to extraordinary emergency situations, but are seen as a permanent challenge for all democracies. This permanent approach, however, places serious pressures on the rule of law. One pressure is that measures introduced in the security context may be extended to the fight against other crimes. This process is facilitated by broad definitions of security implicit in the definition of serious criminal means in the security bill. Another pressure is that once a security measure is upheld under the limitation provisions for rights, it may obtain a legitimacy and a permanency that it may not otherwise deserve. Governments in Hong Kong, Canada and elsewhere stress that no rights are absolute and are subject to a balancing exercise in which the state's interest in security is entitled to considerable weight. Should courts accept such arguments, the result may be a higher tolerance for infringements on various expressive, associational rights and standards of due process or adjudicative fairness. This in turn could lead to further incursions on these rights in other contexts and raises the

issue of whether judicial enforcement of human rights norms and judicial balancing of security with rights will provide sufficient protection for robust democracies and sufficient restraint on state powers. Moreover in both Canada and Hong Kong, governments have the ability to rebuke courts that do not defer to crime control activities. In Canada this includes Parliamentary replies that have reversed pro-accused Charter decisions without the use of the override. In Hong Kong, there is also the possibility that the Standing Committee of the National People's Congress may assert the last word over the interpretation of rights in the Basic Law. The former is a decision of a government that the people of Canada have elected and can presumably refuse to re-elect while the latter is not.

The reliance on judicial enforcement of rights also has implications for citizens. The precise ambit of a broadly worded bill will in many cases not be known until the judiciary has interpreted the law and applied its own tests of proportionality and necessity. Although this process has the potential to safeguard fundamental rights, it also makes it more difficult for the citizen to know the limits of the law and the limits of dissent. The judiciary may read down an overbroad security law, but the law remains on the books and can influence both the police and those who worry about running afoul of the law. The reliance placed on judicial control of a potentially overbroad security law also has another consequence for citizens. It presents a temptation to defer some of the difficult questions of the scope of the law from the democratic process of legislative debate to the judicial arena. In other words, there is a temptation to rely upon the judiciary to fix or narrow a potentially overbroad law. Although the independent judiciary can and should play this important role, democracy can itself be harmed and debilitated by deferring difficult issues to the judicial arena. In addition, any judicial remedy for overbreadth may not have the same systemic effects as a legislative remedy.

Citizens in a democracy should not rely on the courts to save them from themselves. They should be vigilant in the review of the state's security measures and not allow overbroad laws to be enacted in the hope that they will subsequently be narrowed by the courts. Fixing the law in the judicial arena imposes costs on those who may be prosecuted or have their expressive and associational activities chilled by the existence of an overbroad law. Democratic debate about the wisdom and necessity of security measures does not end even if the government is correct in its prediction that courts will conclude that violations of

rights in security laws are acceptable.[91] If ever enacted, an Article 23 security bill should provide for a three year legislative review, as required in the anti-terrorism laws of Canada and some other countries. The courts are an important institution for sober second thoughts, but not the only institution

III. Conclusion

Although the security bill has been withdrawn for the time being, the Chief Executive has maintained that it is both the "constitutional duty" and the "civic duty of the people of Hong Kong" to enact legislation under Article 23.[92] The security bill embraced both old and new visions of security through the creation of traditional crimes based on betrayal of the state and newer crimes based on modern terrorist techniques of destroying private property and disrupting essential services and electronic systems. The pursuit of either of these visions of security would present severe challenges for the rule of law, civil society and the development of democracy, but Hong Kong's proposed double dose of security would have been an overdose. Any new bill may well continue to embrace both an older vision of security as found in the wording of Article 23 and a newer vision of security as found in the definition of serious criminal means in the security bill and new anti-terrorism laws enacted throughout the world.

The government's attempt to defend the older vision of security in the bill on the basis of the laws of western democracies was not persuasive. Although treason and sedition laws remain on the books in Canada and other democracies, they have become a dead letter that have not been revived even after the trauma of September 11. Planning and advocating secession in Canada is not treated as a crime. A somewhat more persuasive defence of the security bill was that similar provisions are found in many modern anti-terrorism laws. The crucial definition of serious criminal means was clearly inspired by the United Kingdom's *Terrorism Act, 2000*, as well as post September 11 anti-terrorism laws in Australia, Canada and Hong Kong. It remained the broadest part of the security bill and the one that was most likely to be used against political dissent, especially given the government's continued

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[91] As Edmund Burke once argued: "It is not, what a lawyer tells me I *may* do; but what humanity, reason and justice tells me I ought to do" . As quoted in K. Roach "The Dangers of a Charter-Proof and Crime-Based Approach to Terrorism" in *The Security of Freedom* supra.

[92] Press Release statement of Mr. Tung Chee Hwa on 5 September, 2003.

refusal to include the same exemption for advocacy, protest, dissent or industrial action that it provided in s.2 of Hong Kong's *United Nations (Anti-Terrorism Measures) Ordinances*.

If it had been enacted, the security bill could have been challenged in court as inconsistent with various rights protected in the Basic Law and the ICCPR. There was also provisions for judicial review of executive decisions to proscribe certain organizations. The independent judiciary can and should play an important role in protecting fundamental freedoms and reviewing the actions of the executive, but the danger of judicial deference or legislative intervention in national security matters remains high. Even when the judiciary does intervene, the remedies it provides for abuse of state power are often limited and after the fact. The ultimate safeguard against repressive laws remains a vigilant civil society, of the kind that was mobilized in such large numbers and so effectively, to oppose the security bill.[93]

[93] Keith Bradsher "Security Laws Target of Huge Hong Kong Protest" *New York Times* 2 July 2003.